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## TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

## No. 384

FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR, ET AL., PETITIONERS,

*vs.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, AND HOBOKEN LAND AND IMPROVEMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1945.

CERTIORARI GRANTED OCTOBER 22, 1945.

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# IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

## Appendix to Appellants' Brief

In United States District Court, District of New Jersey

Relevant Docket Entries

July 26, 1943. Petition for Reorganization under Section 77 filed 10:00 A. M. at Newark, N. J.

July 26, 1943. Order approving Petition as properly filed & designating Sept. 10, 1943, for filing a statement of Assets & Liabilities and order for hearing on 8/23/43 for the appointment of Trustee.

Aug. 5, 1943. Order with respect to the mailing of Notice approving payment of City Taxes, etc.

Aug. 6, 1943. Debtor's report of mailing and publication of Notice.

Aug. 18, 1943. Answer of Respondent, The Pennsylvania R. R. Co.

Sept. 1, 1943. Order continuing hearing for appointment of Trustees.

Sept. 9, 1943. Statement of operations and balance sheet from 7/27/43 to 7/31/43.

Sept. 9, 1943. Statement of Assets and Liabilities.

Sept. 13, 1943. Reply of Debtor to answer of The Pennsylvania R. R. Co.

Oct. 11, 1943. Order appointing Forrest S. Smith, Shrewsbury Trustee.

Oct. 11, 1943. Minutes.

Oct. 11, 1943. Testimony.

Oct. 22, 1943. Statement of Operations and Balance Sheet month of August, 1943.

Oct. 22, 1943. Railroad Primary Blanket Fidelity-Culpable Negligence Bond No. F.50107; with Rider and Amendment to Joint Insured Rider.

[fol. 2] Oct. 29, 1943. Order for the payment of City Taxes due the City of Hoboken—Order No. 6 (Fake).

Nov. 6, 1943. Statement of Operations and Balance Sheet Month of Sept. 1943.

Nov. 12, 1943. Bond of Trustee.

Nov. 12, 1943. Oath of Office of Trustee.

Nov. 15, 1943. Petition and order fixing Payment of compensation of Trustee.

Nov. 24, 1943. Petition for leave to pay real estate and franchise taxes.

Nov. 24, 1943. Affidavit of mailing notice of motion re: payment of real estate and franchise taxes, returnable 11/29/43.

Nov. 29, 1943. Hearing on Trustee's Petition for order to pay real estate and franchise taxes, etc. (cal.) (Fake) No opposition.

Nov. 29, 1943. Order No. 8, authorizing payment of Real Estate and Franchise taxes.

Nov. 29, 1943. Petition for order modifying injunction so as to permit Petitioner to terminate lease and notice thereon.

Dec. 4, 1943. Proof of Service of copy of Notice of Motion for order modifying injunction so as to permit petitioner to terminate lease and the annexed Petition.

Dec. 6, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken Railroad Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off to Dec. 20, 1943.

Dec. 7, 1943. Statement of operations and balance Sheet—Month of October 1943.

[fol. 3] Dec. 13, 1943. Petition for Instructions.

Dec. 13, 1943. Order No. 9 instructing Trustee Regarding employment of Independent Accountants.

Dec. 20, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off 1 week.

Dec. 27, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off to Jan. 10/44.

Dec. 29, 1943. Petition for Instructions of Forrest S. Smith Trustee, re: payment to employees.

Dec. 29, 1943. Order No. 10 instructing Trustee re: payments to employees of debtor.

Jan. 3, 1944. Petition for confirmation of Trustee's appointment of counsel.

Jan. 3, 1944. Order No. 11, confirming Trustee's appointment of Counsel.

Jan. 4, 1944. Petition for Instructions and Order No. 12, instructing Trustee regarding sum due to George A. Fuller Co. and Merritt-Chapman and Scott Corporation.

Jan. 5, 1944. Statement of Operations and Balance Sheet—Month of November 1943.

Jan. 10, 1944. Hearing on Motion for Order modifying Order #1 and #5 so as to permit Hoboken R. R. Ware- [fol. 4] house & Steamship Connecting Co. to terminate the lease between said company and debtor, dated 6/19/06, (cal.) Off to 2/14/44.

Jan. 20, 1944. Notice of Petition for Order extending the time for filing a Plan of Reorganization.

Jan. 20, 1944. Petition for Order extending Trustee's time to adopt executory contracts and for instructions on payment of use and occupation and Notice of Motion thereon, returnable 1/24/44.

Jan. 24, 1944. Hearing on Motion for Order extending time of Debtor to file Plan of Reorganization and Motion for order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation (Cal.) Off one week.

Jan. 26, 1944. Petition for Instructions of Forrest S. Smith, Trustee, re: action he should take with respect to the United States' request for an agreement for indemnity and release.

Jan. 26, 1944. Order No. 13, instructing Trustee to execute and deliver a release and indemnity agreement etc.

Jan. 26, 1944. Order No. 14, continuing Trustee's Motion for an Order extending time on Executory Contracts, etc. and granting temporary extension of time.

Jan. 28, 1944. Petition and Order No. 15, relating to Employment of Counsel.

Jan. 28, 1944. Petition and Order No. 16, for instructions as to Appeal to U. S. Supreme Court in Civil No. 2092.

[fol. 5] Jan. 31, 1944. Hearing on Motion for Order extending time to Debtor to file Plan of Reorganization (Fake) (Cal.) Motion granted, extending time to 4 weeks.

Jan. 31, 1944. Hearing on Motion for order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation, etc. (Fake) (cal.) Continued to 3/27/44.

Feb. 8, 1944. Notice of Motion on Petition for Order modifying injunction so as to permit petitioner to terminate lease.

Feb. 14, 1944. Statement of Operations and Balance Sheet for Month of December, 1943.

Feb. 14, 1944. Hearing on Motion for Order Modifying Orders #1 and #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said company and debtor dated 6/19/06 (cal.) Briefs to be filed. Decision Reserved (cal.) (Fake).

Feb. 14, 1944. Hearing on Trustee's motion on instruction for payment for use and occupation (Cal.) Off 1 week (Cal.) (Fake).

Feb. 14, 1944. Order No. 17, continuing Trustee's time to adopt or reject executory contracts and continuing Trustee's Motion to fix payment of use and occupation.

Feb. 17, 1944. Amended Income Statement.

Feb. 21, 1944. Hearing on Trustee's Motion on instruction for payment for use and occupation (cal.) Off to March 6 (Cal.).

Feb. 25, 1944. Petition and Order No. 18, permitting Trustee to employ Accountant Specially.

[fol. 6] Feb. 25, 1944. Petition and Order No. 19, fixing time within which the Claims of Creditors may be filed, etc.

Mar. 6, 1944. Trustee's Motion on Instruction for payment for use and occupation (Cal.) Off 2 weeks.

Mar. 6, 1944. Petition and Order No. 20, permitting Trustee to employ accountants specially.

Mar. 8, 1944. Statement of Operations and Balance Sheet for Month of January, 1944.

Mar. 9, 1944. Petition for Order Authorizing payment of retroactive Wage Increases to all of the debtor's employees & Notice of motion thereon returnable 3/13/44.

Mar. 13, 1944. Hearing on Motion for an Order authorizing payment of retroactive wage increase to all of the debtor's employees, etc. (cal.) (Fake) Motion granted.

Mar. 13, 1944. Order No. 21 authorizing payment of Retroactive Wage Increases.

Mar. 20, 1944. Hearing on Trustee's Motion on Instruction for Payment for Use & Occupation (cal.) (Fake) (Order is to be drawn providing for the payment of rent in accordance with the decision of the Court of Errors and Appeals).

Mar. 20, 1944. Order of Interstate Commerce Commission directing that Report of Bureau of Accounts concerning income of debtor from 3/1/32 to 5/31/43 to be filed and

made a part of the record therein, with Copy of Report referred to.

Mar. 23, 1944. Petition and Notice of Motion for an Order further extending Trustee's time to adopt or reject executory contracts, returnable 3/27/44.

[fol. 7] Mar. 24, 1944. Order No. 22, fixing reasonable value of the use and occupation of leased premises and directing payment thereof.

Mar. 27, 1944. Hearing on Motion for order extending the Trustee's time to adopt or reject executory *and* contracts and for instructions on payment of use and occupation, etc. (cal.) Off two weeks.

Mar. 30, 1944. Order No. 23, continuing Trustee's Motion for an Order further extending time on Executory Contracts, etc. and granting temporary extension of time.

Apr. 1, 1944. Statement of Operations and Balance Sheet for Month of February 1944.

Apr. 10, 1944. Hearing on Motion for Order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation, etc. (cal.) Off to 6/1/44.

Apr. 10, 1944. Affidavit of Trustee as to why the time of adoption or rejection of executory contracts should be further continued at least until 9/25/44.

Apr. 13, 1944. Order No. 24 further extending Trustee's time to adopt or reject executory contracts.

Apr. 17, 1944. Trustee's Report of Publication and of mailing under Order No. 19 filed 2/25/44, determining and fixing the time and manner of filing claims.

Apr. 29, 1944. Statement of Operations and Balance Sheet for Month of March, 1944.

May 8, 1944. Copy of Proof of Claim of Collector of Internal Revenue in Amount of $532.16.

[fol. 8] May 15, 1944. Petition and Order No. 25, authorizing Trustee to compensate special accountants and approving filing of Monthly Report.

May 26, 1944. Petition and Notice of motion for an order authorizing Trustee to continue in force executory contracts and acknowledgments of service.

May 29, 1944. Hearing on Notice of motion for order authorizing trustee to continue in force executory contracts (cal.) (Fake) Off to 6/1/44.

May 29, 1944. Hearing on Notice of motion to authorize Trustee to compromise 1941 and 1942 income taxes (cal.) (Fake) Order to be signed (cal.).

May 29, 1944. Petition and Order No. 26, authorizing Trustee to compromise 1941 and 1942 income taxes (Fake).

May 31, 1944. Statement of Operations and Balance Sheet for month of April, 1944.

June 1, 1944. Hearing on Notice of Motion for order authorizing trustee to continue in force executory contracts (cal.) (Fake) off to 6/12/44.

June 9, 1944. Proof of Claim of the Baltimore & Ohio R. R. Co., et al. in amount of $2,380.74.

June 12, 1944. Proof of Claim of the Pennsylvania R. R. Co. in the amount of $2,129,400.00.

June 12, 1944. Hearing on Notice of Motion for Order authorizing Trustee to continue in force executory contracts (cal.) Ordered motion granted (Fake).

[fol. 9] June 12, 1944. Order No. 27 authorizing Trustee to continue in force executory contracts (Fake).

June 12, 1944. Stipulation of Facts.

June 13, 1944. Proof of Claim of Seatrain Line, Inc. for various amounts.

June 15, 1944. Proof of Claim of Hoboken Land and Improvement Co. in amount of $65,000.00 with interest from 4/1/40.

June 15, 1944. Proof of Claim of Hoboken R. R. Warehouse & Steamship Connecting Co. in the amount of $50,975.01, with interest.

June 22, 1944. Affidavit of Mailing, including copies of election instruments, comprising proof of Trustee's election to adopt executory contracts.

June 24, 1944. Statement of Operations and Balance Sheet for month of May, 1944.

July 13, 1944. Petition & Order No. 28 re: claims to Locomotive 601 returnable July 17, 1944.

July 17, 1944. Hearing on order to show cause on locomotive 601 (cal.) Continued 2 weeks.

July 17, 1944. Order No. 29 continuing Order to Show Cause (#28) re: locomotive 601 to 7/31/44 (Fake).

July 17, 1944. Affidavit of service of Order No. 28.

July 20, 1944. Copy of Amended Proof of Claim of Internal Revenue Service.

July 20, 1944. Notice of Motion & Petition for Order further extending debtor's time to file a Plan of Reorganization.

July 24, 1944. Motion for order for further extending debtors time to file Plan of Reorganization (cal) Continued 4 weeks.

[fol. 10] July 26, 1944. Statement of Operations & Balance Sheet Month of June 1944.

July 26, 1944. Order No. 29 further extending Debtor's time for filing Plan of Reorganization until 8/26/44.

July 31, 1944. Hearing on Order to Show Cause on Locomotive 601 (cal.) Continued one week.

Aug. 4, 1944. Opinion of Hon. Guy L. Fake, U. S. Dist. Judge, granting motion to terminate lease dated 6/19/06, between debtor and Hoboken R. R. Warehouse & Steamship Connecting Co. et al.

Aug. 7, 1944. Affidavit of Graham M. Brush, President of Seatrain Lines Inc., re: order No. 28 re: claims to Locomotive 601.

Aug. 7, 1944. Hearing on Order to Show Cause on Locomotive 601 (cal.) Ordered adjourned to 8/14/44 (Fake).

Aug. 9, 1944. Ordered No. 30 continuing hearing under Order 28 re: Locomotive 601 to 8/14/44 (Fake).

Aug. 10, 1944. Amendment of Proof of Claim of Seatrain Lines, Inc.

Aug. 11, 1944. Petition for an Order further extending Debtor's time for filing a Plan of Reorganization, with Notice of Motion thereon, returnable 8/14/44.

Aug. 14, 1944. Hearing on Motion for an Order further extending Debtor's time for filing a Plan of Reorganization (cal.) (Fake) Order signed.

Aug. 14, 1944. Order No. 31, further extending Debtor's time for filing a Plan of Reorganization to 2/24/45.

[fol. 11] Aug. 14, 1944. Hearing on Order to Show Cause on Locomotive 601 under Order No. 28 (cal.) (Fake) Ordered adjourned to 11/13/44 (Fake).

Aug. 14, 1944. Order No. 32 continuing hearing under Order 28 to 11/13/44 (Fake).

Aug. 17, 1944. Notice of Motion for Order terminating lease between Hoboken R. R. Warehouse & Steamship Connecting Co. & Hoboken Mfg. R. R. Co.

Aug. 21, 1944. Hearing on Notice of Motion for Order Terminating Lease (cal) Ordered adjourned to 8/28/44 (Fake).

Aug. 25, 1944. Affidavit of Edward J. O'Mara.

Aug. 28, 1944. Affidavit of Andrew R. MacGowan.

Aug. 28, 1944. Hearing on Notice of Motion for Order Terminating Lease (cal.) Ordered adjourned to 9/5/44.

Aug. 30, 1944. Notice of Motion on petition of Hoboken Land & Improvement Co. to Terminate Leases.

Sept. 2, 1944. Statement of Operations and balance sheet for July, 1944.

Sept. 5, 1944. Hearing on motion for order Terminating Lease, (Cal.) (Fake) Hearing continued—no date fixed.

Sept. 13, 1944. Notice of Motion to advance date of hearing on Order No. 28 re: claims to Locomotive 601.

Sept. 18, 1944. Hearing on Notice of Motion to advance date of hearing on Order No. 28 re: claims to Locomotive 601 (cal.) (Fake) Ordered continued two weeks (Fake).

[fol. 12] Sept. 25, 1944. Order #33 continuing hearing on Order No. 28 re: claims to locomotive No. 601.

Oct. 2, 1944. Ordered motion to advance date of hearing on Order No. 23 re: claims to locomotive 601 be advanced to 10/23/44 (Fake).

Oct. 4, 1944. Statement of Operations and balance sheet, Month of August 1944.

Oct. 6, 1944. Order No. 34 continuing hearings of Motions for order terminating leases (Fake).

Oct. 9, 1944. Order No. 35 re: Reclamation petition for Locomotive No. 601 (Fake).

Oct. 9, 1944. Order No. 36 advancing hearing on Order No. 28 re: claims to locomotive No. 601 (Fake).

Oct. 10, 1944. Certified copy of a certificate approved by the Commission relative to expenses incurred.

Oct. 23, 1944. Hearing on petition for reclamation for locomotive No. 601. Ordered issue in petition for reclamation be joined with issues in Trustee's Petition for Instructions (Fake).

Oct. 23, 1944. Ordered hearing on motion for terminating lease adjourned until 11/13/44 (Fake).

Oct. 23, 1944. Hearing on Order to Show Cause on Locomotive 601 under Order No. 28. Ordered issues in Trustee's petition for Instructions be joined with issues in Petition for Reclamation.

Oct. 23, 1944. Order No. 37 directing Trustee to pay cost of Report to I. C. C. (Fake).

[fol. 13] Oct. 23, 1944. Trustee's answer to petition.

Oct. 31, 1944. Statement of Operations and Balance Sheet Month of September 1944.

Oct. 31, 1944. Order No. 38 referring matters to Special Master, etc. (Fake).

Nov. 13, 1944. Hearing on motion for order terminating lease adjourned to 12/4/44 (Fk).

Nov. 14, 1944. Answer of Seatrain Lines Inc. to petition of Trustee re: Locomotive 601.

Dec. 1, 1944. Statement of Operations and Balance Sheet for Month of October 1944.

Dec. 4, 1944. Ordered hearing on motion for an order terminating lease adjourned to 12/11/44 (Fk).

Dec. 11, 1944. Ordered hearing on motion for an order terminating lease adjourned to 12/18/44 (Fake).

Dec. 18, 1944. Hearing on Motion for order terminating leases—Decision reserved (Fake).

Dec. 19, 1944. Order No. 39 Terminating Leases (Fake).

Dec. 21, 1944. Order No. 40 authorizing Trustee to pay Appeal costs on lease Termination Order out of Estate Funds (Fake).

Dec. 21, 1944. Order No. 41 instructing Trustee to pay 1944 real estate and franchise taxes (Fake).

Dec. 21, 1944. Order No. 42 instructing Trustee to make 1944 Bonus Payments (Fk).

Dec. 21, 1944. Notice of Appeal.

Dec. 22, 1944. Copy of Notice of Appeal sent to Wm. P. Rowland, Clerk of USCCA and to Wall, Haight, Carey & Hartpence.

[fol. 14] Dec. 26, 1944. Hearing on motion for a stay of the operation of Order No. 39 pending appeal—Ordered motion denied (Fake).

Dec. 26, 1944. Order No. 43 denying motion for stay (Fk).

Jan. 3, 1945. Affidavits of Serving notice, and copy of Order No. 39.

Jan. 5, 1945. Stipulation as to Record on Appeal.

Jan. 5, 1945. Statement of Operations and Balance Sheet—Month of November 1944.

[fol. 15] IN UNITED STATES DISTRICT COURT

PETITION

For an Order of Approval Under Section 205, Title 11, United States Code, and for Further Relief

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The petition of Hoboken Manufacturers Railroad Company, a railroad corporation organized and existing under the laws of the State of New Jersey, hereinafter referred to as the "Debtor", respectfully represents:

1. Debtor is a railroad corporation duly organized and existing under the laws of the State of New Jersey, is a citizen and resident of said State, and is a common carrier by railroad engaged in the transportation of property in interstate commerce, its operations in connection therewith being entirely within the State of New Jersey. It is not a street, suburban or interurban electric railway. During the six months period immediately preceding the filing of this petition the Debtor has had and now has its principal operating office in the City of Hoboken, State of New Jersey in the District of New Jersey.

2. The only railroad which Debtor operates is a switching railroad line along the waterfront of Hoboken, N. J., entirely within the State of New Jersey. Its line connecting on the north with the line of the Erie Railroad Company and through this connection and also through a float bridge, it interchanges freight with other trunk line railroads serving New York Harbor. As a common carrier by railroad, it is subject to the Interstate Commerce Act and files schedules of rates and files financial reports and accounts with the Interstate Commerce Commission pursuant to that Act.

3. The major part of Debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906 for a term of 99 years from Hoboken Railroad Warehouse and Steamship Connecting Company hereinafter some-
[fol. 16] times referred to as the lessor. Other smaller parcels are held under leases of approximately the same date and term from Hoboken Land and Improvement Company.

4. Debtor owns three railroad locomotives and it has rented another locomotive from Seatrain Lines, Inc. Debtor owns no railroad freight cars but rents freight cars for the transportation of freight over its line from other railroads owning the same, paying to them rental or so-called per diem under contract through the Association of American Railroads.

5. Debtor has issued and outstanding 4,000 shares of common stock of a par value of $100. per share, all of said stock except directors' qualifying shares being owned by Seatrain Lines, Inc., a corporation organized under the laws of the State of Delaware.

6. Debtor has no outstanding bonds and no secured indebtedness.

7. (a) According to Debtor's latest balance sheet as of May 31, 1943, Debtor had current assets totaling $234,681.49, including cash of $133,130.77 and miscellaneous accounts receivable of $83,413.17. At the same time Debtor had total current liabilities of $316,770.60 of which amount $213,122.22 represented traffic and car service balances due to railroad connections of Debtor and owners of cars used by Debtor. On information and belief the relation of current liabilities to current assets is not materially different as of the date hereof.

(b) In addition to the aforesaid liabilities of Debtor as of May 31, 1943, Debtor was then and is now indebted to Seatrain Lines, Inc. in the amount of $100,000 represented by a past due note, dated January 11, 1937, and payable January 11, 1940.

8. The financial condition of Debtor is seriously aggravated by the following additional circumstances:

[fol. 17] (a) On or about July 2, 1943, judgment was entered against Debtor in the Court of Common Pleas of Hudson County, New Jersey, in the amount of $27,965.00 in a suit brought against it by its lessor, Hoboken Railroad Warehouse and Steamship Connecting Company. The circumstances of this suit were, briefly, as follows: The lease of June 19, 1906 referred to in paragraph 3 hereof provides that the rental to be paid by Debtor thereunder shall be the sum of several items, to wit: (1) a stated amount of $22,000 per year;

(2) certain amounts per ton of freight transported over the lines of Debtor subject to the lease and referred to as "tonnage rents"; (3) all premiums of insurance upon the leased premises, and (4) all taxes upon the demised premises or upon the lessor by reason of its ownership thereof and of the appurtenant franchises or upon the rent reserved by the lease which the lessee may be required to pay thereon or retain or deduct therefrom. For the first time in the history of the lease, the lessor in or about 1933 demanded that under the tax clause referred to Debtor should pay as part of the rent the Federal income taxes for which the lessor was liable. Debtor paid such taxes at first through oversight but subsequently refused to pay them. Lessor thereafter demanded that debtor as part of the rent should also pay the excess profits and capital stock taxes of the lessor. Lessor also demanded that Debtor pay rent on certain tonnage, which Debtor declined to do, believing the tonnage not within the terms of the lease. Upon Debtor's refusal to pay such taxes and excess tonnage amounts as additional rent, lessor demanded arbitration under a clause of the lease providing for arbitration in the event of dispute between the parties. Arbitration was thereupon had before three arbitrators. The arbitrators made an award against Debtor in the total amount claimed by lessor, namely, $24,102.43, one of the arbitrators dissenting on [fol. 18] the ground that the only questions before the arbitrators were questions of law, that the arbitrators intended to decide according to law and that pursuant to the law and in accordance with the terms of the lease Debtor was not obligated to pay the income, excess profits and capital stock taxes of the lessor nor was it called upon to include the tonnage in question in the total tonnage upon which rent was paid. Debtor thereupon instituted suit in the Court of Chancery of New Jersey, to set aside the award on the ground that the arbitrators intended and must have intended to decide according to law and that their decision was erroneous as a matter of law. At about the same time the lessor instituted a suit at law against Debtor in the Court of Common Pleas of Hudson County to enforce the arbitration award. The latter suit was stayed pending action upon Debtor's suit in the Court of Chancery.

The Vice Chancellor held against Debtor, ruling notwithstanding the statement to the contrary in the opinion of the dissenting arbitrator, that there was no indication that the arbitrators intended to decide according to law. On appeal this decision was affirmed by the New Jersey Court of Errors and Appeals. Thereafter the stay of the lessor's suit at law having been vacated, the aforesaid judgment in said suit was entered against Debtor in the amount of the arbitrator's award plus interest thereon.

(b) The foregoing suit related to rent for the fiscal years from June 30, 1932 to June 30, 1939, both inclusive. On or about March 31, 1943 said Lessor instituted a second action at law in the Court of Common Pleas of Hudson County, to recover from Debtor as additional rent for the fiscal years ending June 30, 1940, 1941 and 1942 the income, excess profits and capital stock taxes assessed against and paid by it in those years in the total amount of $13,162.89 and also a further sum of $1,403.55 computed by including in the [fol. 19] tonnage on which tonnage rents were computed freight similar to that which Debtor had previously believed not within the terms of the lease, the total amount sued for including interest being $14,566.44. This suit is pending.

(c) On information and belief Debtor's said lessor, Hoboken Railroad Warehouse and Steamship Connecting Company, has filed its income tax returns upon a cash basis. Consequently, upon the collection of the judgment for additional rent, representing the income, excess profits and capital stock taxes of said lessor and the additional tonnage rents, the sum so collected will constitute additional income to said lessor for the year in which it may be collected and thereupon further income and excess profits taxes will be due thereon, which under the lease as interpreted by the arbitrators and by the Court of Chancery, Debtor will be obligated to pay. Debtor believes that lessor's income is such that these additional taxes will be very substantial.

(d) Of the total of the additional rent claimed by Lessor represented by the judgment for $27,965.00 in the first suit and the amount of $14,566.44 demanded

in the second suit Debtor has accrued $39,498.12 as a contingent liability on its books and it is included in the balance sheet figures stated in paragraph 7 hereof.

(e) Included in the aforesaid liabilities of Debtor stated in paragraph (a) hereof is an amount of $188,059.92 due to the Pennsylvania Railroad Company, representing the difference between the sum of $209,046.90 for per diem or car rental on cars of the Pennsylvania Railroad Company which had been delivered to Debtor during the period between 1932 and May 31, 1943 and so-called switching reclaim due from Debtor to said Pennsylvania Railroad Company in the amount [fol. 20] of $20,986.98. Debtor had from time to time tendered payment of such per diem less switching reclaim to the Pennsylvania Railroad Company, the amount of such per diem owing and tendered by it being computed at the rate of $1.00 per day, the established per diem rate fixed by the Association of American Railroads and held reasonable by the Interstate Commerce Commission for all railroads. The Pennsylvania Railroad Company, however, from time to time has refused to accept payment from or make settlement with Debtor in accordance therewith and has instead claimed compensation for its cars at the rate of $10.00 per day, or ten times the established per diem rate, on such of its cars as were delivered by Debtor to the vessels of Seatrain Lines, Inc. Upon Debtor's refusal to pay such compensation, the Pennsylvania Railroad Company has brought two suits against Debtor and Seatrain Lines, Inc., which are pending in the United States District Court for the Southern District of New York, in which the total amounts claimed computed at the rate of $10.00 per car per day are $1,403,640 and $725,384.00, respectively. Debtor has asserted various counterclaims in these suits, including counterclaims for increased divisions as hereinafter more fully explained. These suits have not been brought to trial pending final adjudication of a proceeding pending in this Court, *The Pennsylvania Railroad Company et al. v. United States of America*, Civil 2092, brought by the Pennsylvania Railroad Company and others to set aside an order of the Interstate Commerce Commission determining $1.00 per day as

the just and reasonable compensation to be received by the Pennsylvania Railroad Company and others for their cars when delivered to vessels of Seatrain Lines, Inc., and requiring the Pennsylvania Railroad Company to consent to such delivery on the payment to it of such compensation.

[fol. 21] 9. Debtor has pending various claims, suits and counterclaims against several railroads for increased divisions of joint through rates claimed by Debtor to be due to it from them. These cannot be brought to a conclusion until a determination by the Interstate Commerce Commission of the just and reasonable divisions of joint rates to which Debtor is entitled from its connection. Complaint was filed by Debtor with the Interstate Commerce Commission in 1933 praying it to make such determination, but the Interstate Commerce Commission failed so to do and dismissed Debtor's complaint. This Court in a proceeding before it, *Hoboken Manufacturers Railroad Company v. United States of America*, Civil No. 1100 on or about December 3, 1942 entered a decree annulling and setting aside the Interstate Commerce Commission's order of dismissal and directing the Interstate Commerce Commission to reconsider its decision and reach a determination making a preliminary determination as to the reasonable compensation to be paid to Seatrain Lines, Inc. and included in the divisions of Debtor. The decision of this Court in said proceeding has been appealed to the Supreme Court of the United States, where the case is now pending, and therefore it does not seem probable that the final determination of Debtor's claim can be had for a long period of time and certainly not in time to enable Debtor to secure the benefits thereof, if any, for the purposes of meeting its current liabilities above described.

10. Debtor has no means of borrowing or otherwise procuring funds to meet the aforesaid obligations now owing by it or as they hereafter mature. Debtor's estimated cash resources are wholly insufficient to meet Debtor's financial requirements, including necessary working capital, so that the Debtor is without funds to continue to operate its railroad and property and maintain the same in condition and repair to render adequate service to the public and at the same time to meet its debts, including the aforesaid lia-

bilities and obligations as they mature. Debtor therefore [fol. 22] desires to effect a plan of reorganization pursuant to Section 77, Chapter 8 of the Acts of Congress relating to bankruptcy, U. S. C., Title 11, Section 205.

11. A copy of this petition is this day being filed with the Interstate Commerce Commission.

12. The filing of this petition was duly authorized by the Debtor by resolution of its Board of Directors adopted at a meeting thereof duly held on the 21st day of July, 1943.

Wherefore, your Debtor prays that an order may be entered approving this action as properly filed under Section 77 and that it may be granted all other and further relief to which it may be entitled.

Hoboken Manufacturers Railroad Company, by Joseph Hodgson, Vice-President. (Corporate Seal.)

J. B. Cossolini, Asst. Secretary.

Collins & Corbin, by Edward A. Markley, a Member of Said Firm, Attorneys for Debtor, 1 Exchange Place, Jersey City, N. J.

Parker McCollester, 25 Broadway, New York, N. Y., Of Counsel.

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[fol. 23] *Duly sworn to by Joseph H. Hodgson. Jurat omitted in printing.*

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In United States District Court

Order

Approving Petition, Continuing Debtor in Possession, Directing Filing of Schedules, Staying Interferences With Debtor's Property, and Fixing Hearing for Appointment of Trustees

Upon due consideration of the petition of Hoboken Manufacturers Railroad Company, the above-named Debtor, filed herein this day and the Court being satisfied that such peti-

tion complies with Section 205 of Title 11 of the United States Code and has been filed in good faith:

It is on this 26th day of July, 1943, on motion of Edward A. Markley and Parker McCollester, of counsel for said debtor, ordered:

[fol. 24] 1. Said petition be, and it hereby is, approved as properly filed under said Section 205 of Title 11 of the United States Code.

2. The Debtor shall be, and it hereby is, authorized and directed, pending further order of this Court in the premises, to run, manage, operate, maintain, preserve and keep in proper condition and repair the railroad and properties, including leased railroads and property, of the Debtor wherever situated, whether in this state, judicial district, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority rights and franchises and to discharge all public duties obligatory upon it; to employ and discharge and fix the compensation of, all officers, agents, employees and counsel; to collect and receive the income, rents, revenues, tolls, issues and profits accrued or to accrue from its railroad and properties, to collect all outstanding interline and other accounts owing to the Debtor and all dividends and interest on securities belonging to it; to sell, convey or lease property of the Debtor, real or personal, not needed in the operation of its railroad to the extent necessary to protect or preserve its railroad, or properties or business, or as may be ordered by this Court, to make additions, betterments and improvements thereto and thereof; to perform its existing contracts made in the regular course of business to the extent that performance thereof may seem desirable, but such performance shall not constitute an affirmance of said contracts or any thereof; to enter into and perform other contracts in the regular course of the conduct of its business; all to the end that the business of the Debtor may be continued, operated and managed according to the customary and usual manner of conducting the same, and all of the foregoing powers to be exercised by the Debtor according to law and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

[fol. 25] 3. The Debtor is authorized in its discretion from time to time, until the further order of this Court, out of

funds now in its possession or hereafter coming into its hands, to pay:

A. All taxes, assessments and other governmental charges now due or hereafter coming due upon or measured by, the properties, pay-rolls, income, franchises or business of the Debtor; *provided, however*, that the Debtor shall make no payment on account of taxes, assessments or other governmental charges, State or local, due or to become due, and whether heretofore or hereafter assessed, upon its properties or any thereof in the State of New Jersey without the further order of this Court;

B. All other current expenses and costs hereafter necessarily incurred in operating, maintaining and preserving its railroad and other properties, collecting the revenues, and conducting the business of the Debtor, whether or not chargeable to operating expenses under applicable accounting rules; including, without limitation, all wages, salaries and compensation of officers, agents, employees and counsel employed or retained by the Debtor, all interline accounts and balances owing by Debtor, including amounts in respect of revenues from freight, traffic interchanged with other carriers, and charges for repairs of, or loss or damage to, rolling stock and equipment interchanged with other carriers, all claims for injuries, death or other loss or damage arising from the operation of its railroad and properties, and all claims for loss, damage or delay to freight and all claims for overcharges and for reparation, and all accounts for services, materials and supplies rendered or furnished to the Debtor, whether chargeable in the first instance to expenses, or otherwise; and including also rent due under any lease or contract for rental of right of way, railway [fol. 26] equipment or other property but not including, unless otherwise ordered by this Court, any portion of rental claimed by any lessor under any lease which represents income taxes, excess profits taxes or capital stock taxes of the lessor and not including, unless so ordered by this Court, any rental based upon volume of freight transported by railroad when such freight has already been once included in the tonnage upon which rent is computed or when such freight is

not actually handled by Railroad as a common carrier, *provided*, that any of the foregoing accounts and claims may, in the discretion of the Debtor, either be paid in full or adjusted or compromised;

C. All amounts hereafter coming due, whether as rent, car hire, *per diem*, mileage or otherwise, in respect of the use or possession by the Debtor of locomotives, cars and other rolling stock and equipment, including the principal of, and interest or dividends on, equipment obligations issued, guaranteed or assumed by the debtor; and all amounts (other than in respect of property taxes payable to the State of New Jersey or any municipality or other taxing authority of said State), hereafter coming due under any lease, joint facility contract, or other contract or arrangement, for or in respect of the occupation or use by the Debtor, whether solely or jointly, of lines of railroad, terminals, docks, piers, tracks, buildings, depots, side-tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad property and facilities and including also rent due under any lease or contract for rental of right of way, railway equipment or other property but not including, unless otherwise ordered by this Court, any portion of rental claimed by any lessor under any lease which represents income taxes, excess profits taxes or capital stock taxes of the lessor and not including, unless so ordered by this Court, any rental based upon volume of freight [fol. 27] transported by railroad when such freight has already been once included in the tonnage upon which rent is computed or when such freight is not actually handled by Railroad as a common carrier; *provided however* that no such payment or payments shall constitute an affirmation or adoption of said leases, joint facility contracts or other contracts or arrangements, or any of them;

D. All liabilities and costs hereafter coming due in respect of the construction or acquisition of property or work heretofore authorized and actually initiated or contracted for by the Debtor and constituting additions, betterments or improvements of any railroad property of or used by the Debtor; but, without further order of this Court, no expenditure shall be made for any acquisition, construction or work con-

stituting an addition, betterment or improvement, not heretofore authorized and actually initiated or contracted for by the Debtor, except for additions, betterments and improvements necessarily incident to the current maintenance and preservation of the Debtor's railroad and properties;

E. All claims, liabilities and costs of the characters specified in the foregoing paragraphs B, C and D of this order incurred by the Debtor and coming due within six months preceding the date of this order in the usual and customary operation of its railroad and properties and the conduct of its business; *provided, however*, that no payment shall, without the further order of this Court, be made under this paragraph E in respect of any additions, betterments and improvements not necessarily incident to the current maintenance and preservation of the Debtor's property, and *provided, further*, that no liability or cost coming due more than six months preceding the date of this order shall be paid by the Debtor without the further order of this Court and *provided, further*, that without [fol. 28] further order of this Court no payment shall be made of any judgment against the debtor entered preceding the date of this order in any proceeding to enforce a claim by a lessor for additional rent under any lease or to enforce an award by arbitrators representing additional rent claimed under any lease to the extent that such judgment or such additional rent represents of is based upon income, excess profits or capital stock taxes of, paid by or assessed against the lessor or excess tonnage rents of the character referred to in B and C hereof or interest thereon; except as provided in paragraphs A and F of this order;

F. All outstanding checks or vouchers for wages, salaries or other compensation for services, regardless of when issued; and all claims preferred under Section 205(n) of Title 11 of the United States Code, regardless of when accrued or of the time of presentation or assertion thereof, but any such claims may be paid in full, or adjusted or compromised by the Debtor, in its discretion;

G. The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp and similar taxes, such office rent as may be required,

and the necessary expense of keeping and preserving its corporate records, of maintaining offices and agencies for transferring and registering its stock and bonds, and the proper charges and expenses of trustees under indentures or mortgages pursuant to which securities of, or assumed or guaranteed by, the Debtor have been issued, but not including the payment of fees to directors for attending meetings of the Board of Directors or Executive or other committees of the Debtor;

H. Allowances in amounts not greater than those heretofore allowed and paid by the Debtor, to superannuated employees and employees who have become disabled or incapacitated in the Debtor's service, and who are receiving such allowances at the date of this order; [fol. 29]

I. Court costs and costs incurred before various State and Federal Commissions or other administrative boards or tribunals; and

J. The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this proceeding, reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause and such others as may have any interest therein, such expense to be taxed as costs in this proceeding.

Until further order of this Court no payment shall be made by the Debtor upon or in respect of the principal of its note dated January 11, 1937 to Seatrain Lines, Inc., nor of car rental or *per diem* due to the Pennsylvania Railroad Company and accruing prior to six months preceding the date of this order, nor of any claim of the Pennsylvania Railroad Company for additional damages or compensation in connection with its cars delivered to and in the possession of Debtor prior to six months preceding the date hereof.

4. The Debtor shall have the power to elect whether to adopt or continue in force, or to refuse to adopt or continue in force or to disaffirm or reject, any lease, trackage, terminal, crossing or operating agreement, or other contract not fully performed to which it is a party or under

which it may be obligated; and the Debtor, or the trustee or trustees hereafter appointed and qualified, shall be allowed a period of six months (or such further period as this Court may allow) from the date of the entry of this order to make such election. Such elections may be made [fol. 30] from time to time, and any such election shall be made by instrument in writing, signed by the duly authorized officer or officers of the Debtor, or by such trustees of the property of the Debtor as may hereafter be appointed and qualify, and delivered, or mailed by registered mail, postage prepaid, addressed to the other party or parties to said lease, agreement or contract; and any such election shall be effective when a copy of such instrument, together with proof of delivery or mailing of a copy or copies thereof as aforesaid to the other party or parties to such lease, agreement or contract shall be filed of record in this proceeding. No occupancy, conduct or user of property or rights by the Debtor, or payments made by the Debtor as rent or otherwise or accepted by it as rent or otherwise, or any other acts or omissions by the Debtor during said period (or such other period as this Court may allow), except an instrument filed and delivered or mailed as aforesaid expressly electing to adopt any such lease, agreement or contract shall be deemed to preclude or conclude the Debtor in respect of such election or be deemed to constitute an election to adopt or continue in force any such lease, agreement or contract. In case payments are made pursuant to the foregoing authority contained in Subdivision C of paragraph 3 hereof and any such leases, agreements or contracts shall be subsequently adopted by the Debtor, or such trustee or trustees of the property of the Debtor, as may hereafter be appointed and qualify, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of the rental due from the Debtor under such leases, agreements or contracts. In case any such lease, agreement or contract shall be disaffirmed or rejected by the Debtor, or by such trustee or trustees, or under a plan of reorganization, the operation of the leased or used properties shall be deemed to have been, and such payments to have been made, for the account of the lessors or owners, respectively, and such payments shall be recovered, set off, or made and charged, on [fol. 31] the earnings or properties, or both, of the respective lessor or owner, as the case may be, prior to any mort-

gage or other lien thereon, by such method as the Court shall determine; and all rights and equities of the parties arising from such payments shall be reserved for later determination.

5. Pending further order of the Court in the premises, the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to liquidate, compromise, adjust or make settlement, by written agreement or consent judgment or otherwise, of any thereof; and likewise to defend and to liquidate, compromise, adjust or make settlement of any actions, proceedings or suits now pending against the Debtor or which may hereafter be asserted or be brought in any court or before any officer, department, commission or tribunal to which the Debtor is or shall be a party; but no payment shall, without further order of this Court, be made by the Debtor in respect of any such actions, proceedings or suits on claims accruing prior to the date of this order, except such claims as may be permitted to be paid by this order or by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

6. The Debtor shall close its present books of account as of the close of business on July 26th, 1943, and shall open new books of account as of the opening of business on July 27th, 1943, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and [fol. 32] disbursements of the Debtor, and shall preserve proper vouchers for all payments made by the Debtor, and shall deposit the monies coming into its hands in the banks in which funds of the Debtor are presently deposited, or such thereof as shall be selected by the Debtor, or in such other bank or banks as shall be selected by the Debtor and approved by this Court.

7. Not later than September 10, 1943, unless the time be extended by further order of this Court, the Debtor

shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on July 26th, 1943, and within 45 days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of such calendar month, together with a summary statement of the revenues and expenses of the Debtor, for such calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor. The officers of the Debtor are hereby directed within 45 days from the date of the entry of this order (unless a later date be directed by this Court on cause shown) to prepare and file with the Clerk of this Court (a) a list of all known creditors of the Debtor and the amounts and character of their debts, claims and securities and the last known post-office address or place of business of each bondholder and creditor and (b) a list of all known stockholders of the Debtor with the last known post-office address or place of business of each. The contents of such lists shall not constitute admissions by the Debtor or any trustee of the estate in this proceeding or otherwise. Such lists shall be open to the inspection of any creditor or stockholder of, or claimant against, the Debtor during reasonable business hours upon application to the Debtor or any such trustee.

8. All persons, including all persons acting or claiming to act as officials or otherwise on behalf of any state, county, [fol. 33] municipality or other taxing authority except the United States, and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any suits against the

Debtor, and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, *provided* that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and *provided*, further, that the title of any owner, whether as trustee or otherwise, to rolling stock and equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order.

9. The Debtor hereby is directed to give notice by mailing a copy of this order to the creditors of Debtor whose addresses are known to it, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date of the entry of this order, once in The Jersey Journal, a newspaper published in the City of Jersey City in the State of New Jersey, and in New York Times, a newspaper published in New York City, of a hearing to be [fol. 34] held on August 23rd, 1943 at 10:30 o'clock A. M., in the Court Room occupied by this Court in the United States Court House, Post Office Building, at Newark, in the State of New Jersey, at which hearing or any adjournment thereof this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof and designated "Exhibit A". When such mailing and publication have been completed the Debtor shall file with the Clerk of this Court its sworn report with respect thereto.

10. This Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper limiting the time within which suits against the Debtor may be brought, staying any suits now pending or hereafter brought against the Debtor, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and con-

firmed, requiring the Debtor to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests and, in general, such orders amplifying, extending, supplementing, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Guy L. Fake, U. S. District Judge.

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[fol. 35] EXHIBIT "A" TO ORDER

Notice to All Creditors and Stockholders of Hoboken Manufacturers Railroad Company.

Pursuant to an order entered July 26th, 1943 by the Honorable Guy L. Fake, Judge of the District Court of the United States for the District of New Jersey, notice is hereby given that a hearing will be held on August 23rd, 1943, at 10:30 o'clock A. M., by said Judge in the Court Room usually occupied by him in the United States Court House, Post Office Building, in the City of Newark, New Jersey, at which hearing or any adjournment thereof said Judge will, pursuant to the provisions of Section 205 of Title 11 of the United States Code relating to bankruptcy, appoint one or more trustees of the property of said Hoboken Manufacturers Railroad Company.

Dated, July 26th, 1943.

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IN UNITED STATES DISTRICT COURT

ORDER NO. 5 APPOINTING TRUSTEE

It appearing from the report of the debtor and the affidavits thereto attached that the debtor gave notice of a hearing to be held before me on August 23, 1943 at 10:30 o'clock A. M. in the matter of the appointment of one or more trustees of the debtor's property, as directed by this Court in its Order No. 1, dated July 26, 1943, and hearing having been had at the time fixed and counsel for the inter-

ested parties having been heard and the hearing having been continued by order of this Court until September 13, 1943 and thereafter by order of this Court having been further continued until October 11, 1943 and such adjourned hearing having been had and counsel for the interested parties having been heard and it being the opinion of the Court that the appointment of one trustee will best serve the interests of all parties, it is on this 11th day of October, 1943, Ordered:

[fol. 36] 1. That Forrest S. Smith, of Shrewsbury, N. J., with an office at 1 Exchange Place, Jersey City, N. J., be and he hereby is appointed trustee of the debtor's property.

2. That the bond of the said trustee be and it hereby is fixed at Fifty Thousand Dollars ($50,000.), conditioned upon his well and truly performing the duties of trustee of debtor's property and duly accounting for any monies and property which may come into his hands and abiding by and performing all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said trustee shall within ten (10) days after such ratification execute and file with this Court a bond in the amount and with the conditions specified in paragraph 2 hereof, with sureties approved by the Judge of this Court for the benefit of whom it may concern.

5. That following said ratification by the Interstate Commerce Commission and upon the filing of such bond, said trustee shall have all the title and shall exercise, subject to the control of this Court and consistently with the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), all of the powers of a trustee appointed pursuant to Section 44 of said Act or of any other section of said Act and to the extent not inconsistent with said Section 77 the powers of a receiver in an equity proceeding and subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor.

6. That following said ratification and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this [fol. 37] order be vested in said Forrest S. Smith as trustee of the debtor's property.

7. That following said ratification and upon filing such bond, said trustee shall have all of the rights, privileges, powers and duties heretofore granted to or imposed upon the debtor pursuant to Order No. 1 of this Court in this proceeding, dated July 26, 1943, and all orders supplementary thereto and amendatory thereof and each and all of the orders heretofore entered in this proceeding shall with respect to said trustee and the property of the debtor be of like force and effect as though said trustee were therein specifically named in the place of the debtor, all of said orders being incorporated in and made a part of this order by reference.

8. That following said ratification and upon filing such bond, said trustee shall by this order have authority and power to designate employees of the debtor to execute and deliver in his stead and as his agent checks, drafts, vouchers, orders, contracts, deeds, leases, and any and all instruments of every kind and nature whatsoever incident to the operation of the property of the debtor and such instruments so executed by the agents of said trustee shall bind such trustee as fully as though his signature had been affixed thereto.

9. That this Court reserves full right and jurisdiction to make from time to time such additional orders herein as the Court may deem proper as well as any orders amending, extending, limiting, modifying or otherwise changing this order, including the provisions of Order No. 1 and any orders supplementary thereto which are by reference incorporated in and made a part of this order, and in all respects to regulate and control the conduct of said trustee in the possession, control and operation of the property of the debtor.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a [fol. 38] certified copy of this order and a copy of the stenographic minutes of the said adjourned hearing of October 11, 1943 to the end that said Interstate Commerce

Commission may determine upon the ratification of the appointment hereby designated and may at its convenience file with the Court its determination herein.

Guy L. Fake, United States District Judge.

ORDER OF INTERSTATE COMMERCE COMMISSION

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 4th day of November, A. D. 1943.

Finance Docket No. 14291

Hoboken Manufacturers Railroad Company Reorganization

The Commission having under consideration the application of Forrest S. Smith, filed October 28, 1943, for ratification of his appointment as Trustee of the property of the Hoboken Manufacturers Railroad Company, debtor, and for an Order fixing a maximum limit of his compensation as such trustee, in proceedings pending in the United States District Court for the District of New Jersey, for reorganization of the debtor's railroad pursuant to the provisions of Section 77 of the Bankruptcy Act, 11 U. S. C. A. sec. 205; and

*It appearing*, That by order of the court entered October 11, 1943, the said Forrest S. Smith was, without objection, appointed trustee of the debtor's property, subject to ratification by this Commission; and

*It further appearing*, That Forrest S. Smith has not been an officer, director, or employee of the debtor, or of any subsidiary corporation or holding company connected [fol. 39] therewith, within one year prior to the date of his appointment as trustee;

*It is ordered*, That the appointment of Forrest S. Smith, as trustee of the property of the debtor, be, and it is hereby, ratified; and

*It is further ordered*, That beginning as of the date when he shall have qualified as trustee and his appointment shall have become effective, compensation at the maximum rate of $5,000 a year to be paid to the said Forrest S. Smith, as trustee of the property of the debtor, be, and it is hereby, approved as reasonable, *provided, however*, that while he serves as such trustee he shall receive no salary or compensation for his services as an officer, director, or employee of

the debtor or any of its affiliated corporations, and that his only compensation from the estate of the debtor shall be that allowed to him as trustee by the judge within the maximum limit herein approved by this Commission as reasonable.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

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[fol. 40] In United States District Court

Notice of Motion

To James D. Carpenter, Jr., Esq., Attorney for Forrest S. Smith, Trustee; Messrs. Collins & Corbin, Esqs., Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.; John A. Hartpence, Esq., Attorney for Pennsylvania Railroad Company:

Please Take Notice that on Monday, February 14, 1944, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move before the United States District Court for the District of New Jersey, at the Courtroom, Post Office Building, City of Newark, New Jersey, for an Order modifying Orders No. 1 and 5 made in this proceeding by the said United States District Court, so as to permit Hoboken Railroad Warehouse and Steamship Connecting Company to terminate the lease between said company and the Debtor herein, dated June 19, 1906, in accordance with the prayer of the annexed Petition.

Yours, etc., Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company.

Dated: February 7, 1944.

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[fol. 41] In United States District Court

Petition for Order Modifying Injunction so as to Permit Petitioner to Terminate Lease

To the Honorable, the Judges of the United States District Court for the District of New Jersey:

The petition of Hoboken Railroad Warehouse and Steamship Connecting Company, a corporation organized and

existing under the laws of the State of New Jersey, hereinafter referred to as the "petitioner" respectfully shows:

1. By indenture of lease dated June 19, 1906, petitioner leased to debtor:

> All and singular the line of railroad of the Lessor in the County of Hudson, in the State of New Jersey, extending from a point in the township of Weehawken in the County of Hudson and State of New Jersey, where said line of railroad of the Lessor connects with the tracks of the Erie Railroad Company, thence southerly over private property to and across the boundary line between said township of Weehawken and the City of Hoboken, and thence southerly and easterly through said City of Hoboken over private property to the southerly line of Fourteenth Street, produced, at its intersection with Hudson Street, thence southerly along Hudson Street to a point north of the southerly line of Eleventh Street, thence southerly and along Hudson Street on a curve easterly to the easterly house line of Hudson Street, thence easterly and southerly over private property to a point in the southerly line of Fifth Street east of the easterly house line of River Street, thence southerly and along the paved roadway along the water front parallel with River Street to the northerly line of Fourth Street; and any other lines of railroad, including branch lines, owned at the time of the execution and delivery of this indenture by the [fol. 42] Lessor and shown on the map hereto annexed; all rights of way, station and terminal grounds and other lands and interests in lands; all roadbed, trestles, viaducts, super-structures, poles, wires, tracks, rails, ties, freight-houses, water-stations, and tanks, turntables, engine-houses, car and machine shops, yards and terminals; all rolling stock and equipment of every description, including locomotive and other engines and cars; all tools, implements and machinery, and all trackage and operating contracts;
>
> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest property, possession, claim and demand what-

soever, as well in law as in equity, of the Lessor, of, in and to the same and every part and parcel thereof, with the appurtenances.

For a period of ninety-nine years from the date of said lease.

2. Article Third, paragraph (1) of said lease provides:

"The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, nor without like consent expressed as aforesaid, mortgage the interest of the Lessee in the demised premises, save (1) to raise moneys for use exclusively for the improvement and betterment of the demised premises and to an amount not exceeding the actual cost of such improvements and betterments or (2) for the purpose of defraying the cost of the construction by the Lessee, in [fol. 43] accordance with the provisions of Article Ninth of this indenture, of an elevated or sub-surface railroad upon the demised premises and to an amount not exceeding the actual cost of such construction. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

3. Article Fifth of said lease provides:

"It is mutually covenanted as follows:

The Lessee shall and will, at the determination of this lease, redeliver and surrender up to the Lessor the demised premises in good order and condition, with

such additions, alterations and improvements as shall have been made thereto.

If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce perform-[fol. 44] ance of such covenants by the Lessee or to recover damages for the breach thereof; or

(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, under the terms hereof, may be then due and unpaid for the use of the demised premises."

4. By Order No. 5 made herein on October 11, 1943, Forrest S. Smith was appointed Trustee of the debtor's property, said appointment to become effective upon ratification thereof by the Interstate Commerce Commission. Said Order provided that following such ratification by the Interstate Commerce Commission, and upon the filing of a bond by the Trustee in conformity with the Order,

"said trustee shall have all the title and shall exercise, subject to the control of this Court and consistently with the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), all of the powers of a trustee appointed pursuant to Section 44

of said Act or of any other section of said Act and to the extent not inconsistent with said Section 77 the powers of a receiver in an equity proceeding and subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor."

The appointment of said Forrest S. Smith as Trustee of the debtor's property was duly ratified by the Interstate [fol. 45] Commerce Commission, and on November 12, 1943, said Forrest S. Smith executed and filed the bond provided for in said Order No. 5 and entered upon his duties as such Trustee.

5. Paragraph 6 of said Order No. 5 made herein on October 11, 1943, provides:

"That following said ratification and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this order be vested in said Forrest S. Smith as Trustee of the debtor's property."

6. Petitioner alleges that by reason of the premises and by reason of the qualification of the said Forrest S. Smith as Trustee of the debtor's property herein, and of the terms and provisions of said Order No. 5, and of the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), the interest of the debtor in the aforesaid lease, and its rights and privileges thereunder, have been transferred to the said Trustee in a proceeding to which the lessee is a party, and the rights, duties and obligations of said lessee have thereby been transferred, encumbered, abrogated and altered, without the previous consent of the lessor expressed by endorsement on the lease made in pursuance of authority granted by resolution of the Board of Directors of the lessor, contrary to the provision of Article Third, paragraph (1) of said lease.

7. On January 5, 1944, petitioner gave notice to the debtor by registered mail of debtor's default under the covenant and agreement contained in Article Third, paragraph (1) of said lease, and requiring the debtor to remedy

the said default. A copy of said notice, marked Exhibit "A", is annexed hereto.

8. Petitioner desires to avail itself of its right to terminate the lease and enter upon the demised premises, in the manner prescribed in said lease, but is advised by coun-
[fol. 46] sel and believes that by the terms of Order No. 1 of this court in this proceeding, dated July 26, 1943, and by the terms of Order No. 5 made by this court in this proceeding, on the 11th day of October, 1943, it is restrained and enjoined from doing so.

Wherefore your petitioner prays that an order may be made, modifying the aforesaid Order No. 1 and Order No. 5, made by this court in this proceeding, so as to permit the petitioner to serve written notice upon the debtor of the termination of the aforesaid lease, in accordance with the terms thereof, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same, free from any right of the trustee or debtor or its assigns.

Hoboken Railroad Warehouse and Steamship Connecting Company, by John J. McGirl, Petitioner.
Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Petitioner.

*Duly sworn to by John J. McGirl. Jurat omitted in printing.*

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[fol. 47] EXHIBIT "A" TO PETITION

January 5, 1944.

To Hoboken Manufacturers' Railroad Company.

SIRS:

Please Take Notice that the appointment and qualification of Forrest S. Smith as Trustee of the property of Hoboken Manufacturers' Railroad Company and the consequent transfer of the lease dated June 19, 1906, between said Hoboken Manufacturers' Railroad Company and the undersigned, and of the rights and privileges thereby granted, to the said Trustee, and the consequent transfer, encumbrance, abrogation and alteration of the rights, duties

and obligations of the lessee thereunder, constitute a default under the covenant and agreement contained in Article Third paragraph (1) of said lease, and you are required to remedy said default.

Hoboken Railroad Warehouse and Steamship Connecting Company, by Kelley Graham, Prest.

Service of a copy of the within Notice of Motion and annexed Petition is hereby acknowledged this 7th day of February, 1944.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee; Collins & Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.

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[fol. 48] IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER AUTHORIZING TRUSTEE TO CONTINUE IN FORCE EXECUTORY CONTRACTS

To the Honorable Judges of the United States District Court for the District of New Jersey:

Forrest S. Smith, the duly qualified and acting Trustee of the property of the above named Debtor, respectfully shows that:

1. By his petition verified March 21, 1944, and filed herein your petitioner prayed that an order might be entered further enlarging and extending the period within which he, as Trustee, might elect whether to adopt or to continue in force, or to refuse to adopt or to continue in force, or to disaffirm or reject any lease, trackage, terminal, crossing, or operating agreement, or other contract not fully performed to which the above named Debtor was a party or under which it was obligated as of July 26, 1943, when the original petition for reorganization herein was filed, to and including September 25, 1944.

2. By Order No. 24 entered herein on April 13, 1944, after argument of the aforesaid petition on April 10, 1944, this Honorable Court further enlarged and extended the period within which your petitioner, as Trustee, might elect whether to so adopt or reject such executory contracts to June 1, 1944.

3. Many of the uncertainties and circumstances which prompted petitioner to seek the above mentioned and prior extensions of time to accept or reject executory contracts herein are still not resolved. Such uncertainties are set forth at length in the petitions filed in these proceedings by your petitioner and verified by him on January 19, 1944, and March 21, 1944, as well as in petitioner's affidavit executed on April 7, 1944. On April 24, 1944, the Supreme Court of the United States ordered the parties to the pending appeals Nos. 845 and 846 concerning interchange of [fol. 49] freight cars by certain railroad companies with Seatrain Lines, Inc., to show cause why the causes should not be dismissed as moot. After submission of briefs the court, on May 8, 1944, dismissed the rule to show cause and noted probable jurisdiction. In petitioner's opinion, no plan for reorganization of the Debtor can satisfactorily be formulated until final disposition of this question by the Supreme Court.

4. In view of the foregoing uncertainties, your petitioner cannot now determine whether it ultimately will be for the benefit of the Debtor's estate and its creditors to presently adopt or reject the various executory contracts. Furthermore, after carefully investigating and studying the question as to whether such contracts should be adopted or rejected, your petitioner cannot now say that it will be for the benefit of the said Debtor's estate to presently reject same. Petitioner is advised by his counsel and believes that rejected executory contracts cannot be included in a plan of reorganization, whereas those which are presently adopted may later be reviewed to determine whether they should be included in or excluded from a plan of reorganization. It is your petitioner's opinion that he and the Debtor should have an opportunity to determine whether or not to include the various executory contracts to which the Debtor is a party or under which it is obligated in a plan of reorganization and, therefore, your petitioner is of the opinion and recommends to this court that such executory contracts should be continued in force pending the formulation and adoption of a plan of reorganization herein.

Wherefore, your petitioner prays that an order may be entered authorizing and directing him to adopt or to continue in force any lease, trackage, terminal, crossing or

operating agreement, or other contract not fully performed to which the Debtor is a party or under which it may be obligated as of July 26, 1943, and to make such elections [fol. 50] pursuant to the provisions of paragraph 4 of Order No. 1 entered herein on said last date.

Forrest S. Smith, Trustee.

*Duly sworn to by Forrest S. Smith. Jurat omitted in printing:*

Service of the within Petition and Notice of Motion is hereby acknowledged this 23rd day of May, 1944.

Collins & Corbin, Attorneys for Hoboken Manufacturers' Railroad Company, Debtor, and Seatrain Lines, Inc.; Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company; John A. Hartpence, Attorney for Pennsylvania Railroad Company.

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[fol. 51] IN UNITED STATES DISTRICT COURT

ORDER NO. 27 AUTHORIZING TRUSTEE TO CONTINUE IN FORCE EXECUTORY CONTRACTS

Forrest S. Smith, the Trustee of the property of the above named Debtor, having filed his petition for an order authorizing him to continue in force executory contracts together with a duly served notice of motion thereon returnable Monday, May 29, 1944, before this court, and the matter being continued on said date to June 1, 1944, when it was further continued and said Trustee's time to adopt or reject executory contracts was further extended to June 12, 1944; and on said last date the matter being opened to the court by James D. Carpenter, Jr., attorney for said Trustee, in the presence of Edward J. O'Mara, of Wall, Haight, Carey & Hartpence, attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Parker McCollester appearing for Collins & Corbin, attorneys for said Debtor and Seatrain Lines, Inc., and John A. Hartpence, attorney for Pennsylvania Railroad Company, and the court having taken

testimony, heard the arguments of counsel thereon and good cause appearing for entry of this order;

Now, Therefore, it is on this 12th day of June, 1944, on motion of James D. Carpenter, Jr., attorney for said Trustee,

Ordered that said Trustee be and he hereby is authorized and directed to adopt and continue in force any and all leases, trackage, terminal, crossing or operating agreements, or other contracts not fully performed to which the Debtor was a party or under which if may have been obligated as of July 26, 1943, the date on which Order No. 1 approving the petition for reorganization was entered herein, and it is

Further *Ordered that the right to enter its objections* to the foregoing provision of this order and to move for [fol. 52] modification of same within ten days from the date hereof is hereby reserved to Pennsylvania Railroad Company.

Guy L. Fake, United States District Judge.

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In United States District Court

Notice of Trustee's Election to Adopt Executory Contracts

To Hoboken Railroad Warehouse and Steamship Connecting Company, 1 Newark Street, Hoboken, New Jersey, and Wall, Haight, Carey & Hartpence, Its Attorneys, 15 Exchange Place, Jersey City 2, N. J.:

Re: Leases and agreements as follows:

1. Lease Hoboken Railroad Warehouse and Steamship Connecting Company to Hoboken Manufacturers Railroad Company dated June 19th, 1906, including Supplement No. 1 thereto dated November 16th, 1920.

2. Modification to main lease dated the 19th day of June, 1907, between Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company.

3. Agreement—American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improve-

ment Company, had the Hoboken Manufacturers Railroad Company, dated June 19, 1906.

4. Amendment to agreement American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improvement Company, and Hoboken Manufac-
[fol. 53] turers Railroad Company, dated the 19th day of June, 1907.

5. Agreement American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improvement Company, and Hoboken Manufacturers Railroad Company, dated June 20th, 1910.

6. Agreement Hoboken Manufacturers Railroad Company, Seatrain Lines, Inc., Hoboken Terminal Properties, Inc., and Hoboken Land and Improvement Company, dated the 8th day of December, 1932.

GENTLEMEN:

This is to notify you that pursuant to Order No. 27 entered in the above entitled proceedings on June 12, 1944, the undersigned, Trustee of the property of the above named Debtor, has elected not to reject but to adopt and continue in force the above indicated executory contracts and agreements between you and said Debtor.

Forrest S. Smith, Trustee.

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IN UNITED STATES DISTRICT COURT

NOTICE OF TRUSTEE'S ELECTION TO ADOPT EXECUTORY CONTRACTS

To Hoboken Land & Improvement Company, 1 Newark Street, Hoboken, New Jersey, and Wall, Haight, Carey & Hartpence, its attorneys, 15 Exchange Place, Jersey City 2, N. J.

Re: Leases and agreements as follows:

1. Lease Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, dated the 19th day of June, 1906 (Plot A).

[fol. 54] 2. Lease Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, dated the 19th day of June, 1906 (Plot B).

3. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to tie leases of Plots A and B to termination of the main lease, dated the 19th day of January, 1915.

4. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to amend rental of Plot A, dated the 26th day of February, 1929.

5. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to amend rental of Plot B, dated the 26th day of February, 1929.

6. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company for land for siding to Ellerman's Wilson Line Pier, dated the 1st day of June, 1921.

GENTLEMEN:

This is to notify you that pursuant to Order No. 27 entered in the above entitled proceedings on June 12, 1944; the undersigned, Trustee of the property of the above named Debtor, has elected not to reject but to adopt and continue in force the above indicated executory contracts and agreements between you and said Debtor.

Forrest S. Smith, Trustee.

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[fol. 55] IN UNITED STATES DISTRICT COURT

Appearances: *Messrs. Carpenter, Gilmour & Dwyer, By James D. Carpenter, Jr., Esq.*, and *Charles B. Collins, Esq.*, Attorneys for Trustee; *Messrs Collins & Corbin, By Edward A. Markley, Esq.*, Attorneys for Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc.; *Messrs. Wall, Haight, Carey & Hartpence, By Edward J. O'Mara, Esq.*, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company.

OPINION—Filed August 4, 1944

FAKE, District Judge:

This is a Railroad Reorganization Proceeding under Title 11 U. S. C. A. Section 205.

The present issues arise on a motion to permit the lessor to terminate a ninety-nine year railroad lease executed June 19, 1906, on the ground of a breach of the terms of the lease. The clause relied upon by the lessor, insofar as pertinent, reads as follows:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner [fol. 56] altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

It is urged that upon the qualification of the trustee herein he acquired such an interest in the lease as to constitute a breach or violation of the conditions above quoted.

It will be noted that this clause is not worded in the exact language found in the usual bankruptcy forfeiture clauses nor is it worded as are the general run of the forfeiture clauses directed against assignment without the consent of the lessor. Here a default is contemplated not only if any sale or transfer of the demised premises is made by the lessee without the authorization of the lessor, but also if a transfer is brought about by any proceeding at law or in equity wherein the lessee is a party, whereby any of the duties of the lessee may be "encumbered, abrogated or in any manner altered."

Jones on Landlord and Tenant, Section 466, is cited with apparent approval in Gazlay v. Williams, 210 U. S.

41. That section reads as follows: "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, *but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.*" And that text so approved is now given the strength of statutory sanction by Title 11 U. S. C. A. Sec. 110b, wherein it is enacted that "*an express covenant that an assignment by operation of law* or the bankruptcy of a specified party thereto or of either party *shall terminate the lease or give the other party an election to terminate the same shall be enforceable.*"

Title 11 U. S. C. A. Section 205(c)(2) provides that "The trustee * * * shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72, or any other section of this title, and, to the extent not inconsistent with this sec- [fol. 57] tion, * * *." This means that title vests in the trustee in a railroad reorganization proceeding to the same extent that it vests in a trustee in a general bankruptcy proceeding. As to the latter the United States Supreme Court held in Isaacs, Trustee v. Hobbs Tie & Timber Co., 282 U. S. 734, that "all property owned and possessed by the bankrupt vests in the trustee." These last quoted words are so clear as to require no further attempts at elucidation. The language "all property owned and possessed by the bankrupt" does not except leases because they may happen to carry a burden with them. They may be abandoned. They do vest however in the trustee.

Turning now to Section 110(b) of Title 11, it is found, with relation to unexpired leases of real property, that the trustee is allowed 60 days, (or an extended period) after adjudication to assume or reject such leases. This is to say, in the instant case, the title of the debtor-lessee became vested in the trustee subject to being divested by a rejection. This should be read in connection with Title 11 U. S. C. A. 110(a) which enacts that the trustee is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition."

The case of Palmer v. Palmer, 104 Fed. 2nd. 161, is relied on by the debtor-lessee for the proposition that, "A lease, being property cum onere, does not pass to a trustee

in bankruptcy, unless he adopts it. * * *" "Yet" (says Judge Learned Hand in the opinion) "if the question were to arise for the first time, it would be a little hard to see by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term * * * * * * insolvency ought not to give the lessee's creditors greater rights to possession than the lessee himself enjoyed; * * *. This necessity should be in no sense affected by the fact that the property may be a railroad, * * *. The question does not concern the public, but is a dispute between two groups having interests [fol. 58] in the property * * *". The judge then says: "Nevertheless, the contrary has been generally held; * * *". The foregoing quotations are extracted from the opinion in the Palmer case, because they disclose the individual views of one whose opinions are held in the highest esteem and they seem to indicate a reluctance on his part to follow the law as he found it. This reluctancy however was dissipated in the rule of stare decisis as he found it in his circuit based upon In re Frazin, 183 Fed. 28 (1910). No case of like tenor has been found in this circuit or in the case law of New Jersey. This court therefore is free to approach the problem raised as one of first instance.

The lease contains a further clause providing that in the event of a breach of covenant and the lapse of thirty days after notice of termination given by the lessor, the lessor may enter. The notice so provided has been served and thirty days have elapsed.

The first question to be disposed of here is: Did the debtor-lessee have any property in the lease at the time it filed its petition herein? The answer is, Yes. It had a leasehold subject to forfeiture on notice in the event of a transfer of the leasehold by operation of law in any proceeding wherein the lessee might be a party. Nothing else appearing, that estate is the specific estate which the trustee herein took upon his qualification.

The second and final question is: Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided? Here again the answer is, Yes.

A reading of the clause under consideration discloses that the character or quality of that which is contemplated

as passing by operation of law must be such as would transfer, encumber, abrogate or alter any of the rights, duties or obligations of the lessee.

The transfer, here by operation of law, has placed the trustee in possession and he is quite a different occupant than the lessee named in the lease. Moreover when the [fol. 59] trustee took, the result of his taking was to abrogate and alter the terms of the lease by reason of Section 1100(b) of Title 11 of the Act, which in effect reads a sixty day period into the lease without the lessor's consent, within which time an adoption or rejection may take place. Surely this would force a different contract on the parties than that into which they each entered with their eyes open. Such a result cannot be justified either by the statutory law, the case law in this circuit, or on the basis of sound reason.

It appears that the trustee herein petitioned the court for leave to adopt the lease while the instant motion was pending and the prayer of the petition was granted. It is argued from this that such adoption resulted in the transfer of the title of the lease in breach of the terms of the lease. By reason of the conclusions above arrived at, I deem it not necessary to pass upon the issue thus raised other than to say that since the debtor-lessee's title passed to the trustee prior to the adoption, nothing was gained or lost by the adoption insofar as present issues are involved.

The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the law relating to the continuous operation of the railroad have been complied with.

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[fol. 60] In United States District Court

Notice of Motion

To James D. Carpenter, Jr., Esq., Attorney for Trustee, Messrs. Collins and Corbin and Parker McCollester, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.

Sirs:

Please Take Notice that on Tuesday, September 5, 1944 at ten o'clock in the forenoon, or as soon thereafter as

counsel can be heard, we shall move before the United States District Court for the District of New Jersey, at the courtroom in the Post Office Building, City of Newark, New Jersey, for an order terminating two certain leases dated June 19, 1906, by and between Hoboken Land and Improvement Company, Petitioner, and Hoboken Manufacturers Railroad Company, Debtor, known respectively as Plot A Lease and Plot B Lease, in accordance with the prayer of the annexed Petition.

Yours, etc., Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Land and Improvement Company, Petitioner.

Dated: August 29, 1944.

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[fol. 61] In United States District Court

Petition of Hoboken Land and Improvement Company to Terminate Leases

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The petition of Hoboken Land and Improvement Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter referred to as the Petitioner, respectfully shows:

1. By Indenture of Lease dated June 19, 1906, Petitioner leased to Debtor all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Hoboken, County of Hudson and State of New Jersey, and particularly described as follows:

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one

hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius [fol. 62] of two hundred and twenty-four and sixty-five Hundredths (224.65) feet one hundred and fifty-six and eighty-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteen Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty-three (58,133) square feet more or less."

Said premises is known as and will hereafter be referred to as Plot A.

2. By Indenture of Lease dated June 19, 1906, Petitioner also leased to Debtor all that certain lot, tract or parcel of land and lands under water in the City of Hoboken, County of Hudson, New Jersey, with the pier, railroad trestle and other structures erected thereon, described as follows:

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what

would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet to the point or place of be- [fol. 63] ginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

Said premises is known as and will hereafter be referred to as Plot B.

3. By Indenture dated the 19th day of January, 1905, by and between Petitioner and Debtor, wherein was recited the making of the aforesaid leases of Plot A and Plot B (referred to in said Indenture as the Leases), the simultaneous execution and delivery by Hoboken Railroad Warehouse and Steamship Connecting Company to the Debtor of the lease of a certain line of railroad (hereafter referred to as the Railroad Lease), the ownership by Petitioner of practically the entire capital stock of Hoboken Railroad Warehouse and Steamship Connecting Company and the fact that the leases were executed and delivered by the Petitioner and accepted by the Debtor in contemplation of the execution and delivery of the Railroad Lease, and that it was the intention of the Petitioner and of the Debtor that the Leases should be dependent upon the Railroad Lease and that any breach of any of the covenants or conditions of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively, and that on the accrual of a right of entry under the Railroad Lease, a right of entry should likewise accrue under the Leases respectively, it was agreed that each of the Leases should be dependent upon the Railroad Lease, and that each of the Leases if not theretofore terminated should terminate at the expiration of the term of the Railroad Lease or the earlier termination, for any cause or in any manner whatever, of the Railroad Lease. It was further agreed by said Indenture that any breach of any covenant or condition of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively, and on the accrual of a right of entry under the Railroad Lease a right of entry should likewise accrue under each of the Leases respectively.

[fol. 64] 4. Your Petitioner has been advised that on or about the 7th day of February, 1944, Hoboken Railroad Warehouse and Steamship Connecting Company filed its Petition herein, alleging the breach of a covenant of the aforesaid Railroad Lease by and between it and the Debtor, and praying for an order permitting it to terminate said Lease by reason of said breach, and that thereafter such proceedings were had on said Petition that this Court by its opinion filed herein on or about August 4, 1944, determined that the motion to terminate said Railroad Lease should be granted, to take effect upon the production to the Court of conclusive evidence that the requirements of the laws relating to the continuous operation of the Railroad have been complied with, and that a motion for the entry of an order in conformity with the aforesaid opinion of the Court is now pending herein.

Wherefore, your Petitioner prays that simultaneously with the entry of an order terminating the aforesaid Railroad Lease, an order may be made, terminating the aforesaid Leases to Plot A and Plot B and directing the Trustee herein to peaceably and quietly release, surrender and yield unto your Petitioner, its successors and assigns, all and singular, the said demised premises in accordance with the terms of the aforesaid Indenture dated January 19, 1915.

And your Petitioner will ever pray, etc.

Hoboken Land and Improvement Company, by John J. McGirl, Petitioner; Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Petitioner.

[fol. 65] *Duly sworn to by John J. McGirl; Jurat omitted in printing.*

[fol. 66] LESSOR EXHIBIT No. 1

Interstate Commerce Commission

Finance Docket No. 14693

Hoboken Railroad, Warehouse and Steamship Connecting Company Operation

Submitted October 28, 1944. Decided December 2, 1944

Application of the Hoboken Rail Road, Ware House and Steamship Connecting Company for Authority to Repossess and Operate a Line of Railroad in Hudson County, New Jersey, Dismissed. Held Not Within the Purview of Section 1 (18) of the Interstate Commerce Act

John J. Hickey and Walter W. Ahrens for applicant.

Edward A. Markley, Frank J. Clark, James D. Carpenter, Jr., and Charles B. Collins for intervenors.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller by Division 4

The Hoboken Rail Road, Ware House and Steamship Connecting Company on September 4, 1944, applied under section 1 (18) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it upon the termination of an existing lease to repossess and operate a line of railroad and appurtenant facilities which it owns but which at present are being operated by Forrest S. Smith, trustee in reorganization proceedings of the Hoboken Manufacturers Railroad Company, lessee, consisting of approximately 1.679 miles of main line and 7.766 miles of branch line or a total of 9.445 miles of track, all in Hudson County, New Jersey.

The line in question was constructed pursuant to a charter granted the applicant by the State of New Jersey on September 17, 1895, authorizing it to construct and operate [fol. 67] certain lines of railroad in Hudson County, and on October 23, 1895, the applicant obtained a franchise from the city of Hoboken permitting it to lay tracks on and operate over certain public streets in that city. The railroad was placed in operation by the applicant on September 7, 1897,

and it continued the operation thereof until June 19, 1906, when, by an agreement as of that date it leased, for a period of 99 years, the railroad, with all facilities, rolling stock, and operating rights to the Hoboken Manufacturers Railroad Company, hereinafter sometimes called the lessee company. The latter thereupon began operation of the property and, except for the 10-year period from July 1, 1917 to July 1, 1927, when the line was operated by the United States War Department, continued such operation until on or about July 26, 1943. On the latter date the lessee company filed in the United States District Court for the District of New Jersey a petition for reorganization under section 77 of the Bankruptcy Act, which petition was allowed as of the same date. The properties since have been operated under direction of the court. The appointment of Forrest S. Smith, as trustee, was approved by us in our order of November 4, 1943, *Hoboken Manufacturers Railroad Company Reorganization*, Finance Docket No. 14291; and he qualified for the position on November 12, 1943.

After the bankruptcy petition was allowed the applicant herein, as lessor of the properties, filed a motion with the court for a termination of the lease of June 19, 1906, on the ground that the reorganization proceedings breached certain terms of the lease agreement. Upon consideration of the premises the court on August 4, 1944, rendered its decision on the motion, *In the Matter of Hoboken Manufacturers Railroad Company, Debtor*, Opinion No. 48732, in which it held, among other things, as follows:

> "The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with."

[fol. 68] In order to satisfy the court the applicant as owner of the railroad properties has filed its application to resume operation thereof but it challenges our jurisdiction in the premises on the ground that the resumption of operation of its own properties, after temporary suspension thereof during the existence of the lease, is not within the purview of section 1 (18) of the act. We are asked, therefore, to find that we have no jurisdiction, and dismiss the application.

After the application was filed the lessee company and the Seatrain Lines, Inc., the latter being the owner of the capital stock of the former, jointly, and Forrest S. Smith as trustee of the lessee company, separately, filed petitions for leave to intervene in which were included requests for a hearing on the merits, for a finding that the resumption of operation by the applicant is within the provisions of section 1 (18) of the act, and for a suspension of the proceedings before us pending final decision on an appeal from the findings of the court that the lease of the properties was terminated by the reorganization proceedings. Upon consideration of these petitions and replies thereto by the applicant, on September 28, 1944, we entered an order herein permitting the petitioners to intervene, and providing for the filing of briefs by all parties on the sole question of the need for a certificate of public convenience and necessity under section 1 (18) of the Interstate Commerce Act to enable the applicant to operate its own property. Pursuant thereto briefs and reply briefs have been filed by the applicant and each of the interveners, except that counsel for the trustee has informed us by letter that no reply brief will be filed on the trustee's behalf.

Under the circumstances described our consideration herein is directed entirely to the question of our jurisdiction in the premises.

The applicant contends that our jurisdiction does not attach because the operation proposed is not over an additional or extended line of railroad within the meaning of [fol. 69] section 1 (18) of the Interstate Commerce Act, but is a mere continuance of the operation previously performed by it, and neither its responsibility for the continued operation of the property nor its operating rights thereover have ceased inasmuch as the lease agreement of June 19, 1906, specifically provided for the prospective reversion and subsequent direct operation by it of the properties involved; that when it obtained a charter and municipal grants from the State and city authorities it thereby incurred a continuing obligation to make provision at all time for the operation of its properties and to furnish reasonably sufficient transportation service thereon, and in the event of the termination of a lease thereof to resume operation for its own account; and that the obligations thus assumed are in no manner affected by the subsequent enactment of section 1

(18). It states further that this primary duty of the owner lessor to resume operation of its railroad properties is emphasized in section 205 (c) (6) of the Bankruptcy Act which provides:

> "(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of the period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

The interveners argue that the portion of the Bankruptcy Act cited proves the contrary of the applicant's contention because if a lease is rejected by the trustee of the debtor the lessor is authorized to operate the property [fol. 70] unless it shall appear that such operation "would be impracticable and contrary to the public interest" in which event it becomes "the duty of the lessee to continue operation on or for the account of the lessor" until we authorize the abandonment of the line. Under such circumstances they say the applicant herein should not be permitted to operate the property owned by it until it has shown in an open hearing, that such operation will not be impracticable or contrary to the public interest; and that likewise the trustee should not be permitted to turn the property over to the applicant until he has been issued a certificate authorizing him to abandon operation. While expressing the view that the question here presented is a novel one for which no precise precedent seems to exist, they assert that the provisions of section 1 (18) plainly prohibit the operation of "any line of railroad" or the abandonment of operation thereof without a certificate of public convenience and necessity first having been obtained from us.

The principal contention of the interveners is that upon termination of the lease the applicant will not become possessed of all the properties now in the hands of and

operated by the debtor trustee, and therefore will be unable to serve the public adequately. In support thereof they refer to certain testimony given before the court by an officer of the lessee company to the effect that the latter during its tenancy acquired title to and owns various tracts of land on which are located appurtenant facilities consisting of an engine house, offices, yards, sidetracks, and certain tracks extending to and serving the waterfront. They also state that Seatrains, Inc., claims title to one of the three locomotives which are used in connection with and are necessary for the continued operation of the properties, and that if this claim were upheld by the court the ability of the applicant to serve the public would be further diminished. According to them about all the property that would revert to the applicant without question upon the termination of the lease is its main tracks. On the con- [fol. 71] trary the latter asserts that the percentage of the total property in dispute is inconsequential.

In the above connection it is the applicant's contention that under the terms of the lease the title to all additions, betterments, and extensions of the properties in the hands of the lessee company passed to the lessor at the time of making or upon the installation thereof. While the interveners concede that appropriate provisions to that effect are contained in the lease they assert that the question is complicated by the fact that the applicant on June 29, 1927, executed certain indentures wherein it released the lessee company from any claims that it might be entitled to make under the lease as to certain of the properties, and that the question also must be determined as to whether the claim of title by the applicant to the additions and betterments, if otherwise valid, is superior to other creditors who are parties to the reorganization proceedings involving the lessee company. With respect to the releases mentioned the applicant states that it expects to present before the court having jurisdiction of the proceedings a widely different version from that advanced by the interveners. However, it argues that these matters are already properly in issue before the court and will be decided there, and that the final disposition thereof cannot effect our determination of the question as to whether the applicant must secure a certificate from us before it may resume operation of the properties with which it will again become possessed upon the termination of the lease.

In cases previously before us we have recognized the continuing obligation of an owner-lessor railroad company for the operation of its leased properties. In *Lehigh Valley R. Co. Abandonment of Operations*, 202 I. C. C. 659, we had before us applications by the lessee to abandon operation of the property owned by the State Line & Sullivan Railroad Company, and by the latter, as lessor, to abandon the property itself. Jurisdiction was taken of both applications and both were denied on their merits but a con- [fol. 72] tention by the lessor that inasmuch as it ceased to be an operating unit when the lease was consummated and had not since engaged in interstate commerce, it was, therefore, not subject to our jurisdiction, was rejected. On page 663, after showing the corporate history of the company, we said:

> "The subsequent lease of its railroad to another company did not change the lessor's relations to the public, nor relieve it from performance of the duties and obligations imposed by its charter or the general laws of the State, *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, and these duties and obligations are not to be cast aside at will. In *Charles Wolff Packing Co. v. Court of Ind. Relations*, 262 U. S. 522, 543, the Supreme Court said that

> > A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous losses (citing cases), it may give up its franchise and enterprise, but short of this, it must continue.

> It follows that the State Line is, and will continue to be, primarily responsible for the performance of its duty to serve the public, unless and until it is duly relieved therefrom according to law, or some other arrangement is made for the operation of its line."

In *Norfolk S. R. Co. Receivers Abandonment*, 221 I. C. C. 258, we assumed jurisdiction and granted the application of the receivers of the Norfolk Southern to abandon operation, under lease, of a line of railroad owned by the Atlantic & North Carolina Railroad Company extending from Goldsboro to Moorehead, N. C., but declined jurisdiction and dismissed the application of the latter for au-

thority as the owner and lessor of the line involved to resume operation thereof. At page 269 we said:

> [fol. 73]. "The record clearly shows that the Atlantic Company as owner of the Atlantic Line, was under obligations to operate it in default of operation by the Norfolk Southern and that when the latter surrendered possession of the Atlantic line, the Atlantic Company had no alternative except to operate it."

Our recent expression in *Livestock Terminal Service Co. Abandonment*, 257 I. C. C. 1, decided May 19, 1944, is particularly pertinent to the issue here involved. At page 7 thereof we said:

> "The Stockyards Company did not begin operation of loading and unloading service under a certificate of public convenience and necessity. Its operation began long prior to the enactment of section 1 (18-20) of the act. But, in the performance of the service for many years, it incurred the relationship and duty to the public of a common carrier by railroad subject to the act. This relationship is not terminated by a lease of carrier facilities to another for performance of the service and, if the lease is terminated, the lessor itself must resume operation and perform its duty to the public until legally relieved of that obligation (citing cases)."

See also *Milwaukee Livestock Handling Company et al. Control*, 257 I. C. C. —, Finance Docket No. 14642, decided October 21, 1944. In the latter case we referred to the fact that a recent review of the authorities on the subject is contained in *Los Angeles & S. L. R. Co. v. Umbaugh*, 123 P. 2nd 224. That decision by the Supreme Court of Nevada holds that a lessee railroad company is the agent of a lessor company in the discharge of the charter powers of the latter.

The sense of our decisions, as well as those of the courts, seems to be that a lessor company by operation of law immediately, and without respect to its own desires in [fol. 74] the matter, becomes responsible for the operation of railroad properties owned by it upon the termination of a lease thereof. No certificate from us is needed because the lessor's obligations and duties to the public have never

ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations the duties must be performed by the lessor on its own behalf. Were this not so, when a long-term lease expired the lessor might contend that having withdrawn as an operating carrier in interstate commerce it had no responsibility for any further operation of the properties, and if it were required to obtain a certificate before resuming operation might decline to make application therefor and avoid any efforts to force it to résume operation on the ground that it was not required to do so unless it obtained a certificate.

We are not convinced that it is our duty herein to consider what practical effect the termination of the lease will have upon the operation of the properties, and in view of our conclusions it would be inappropriate for us to do so. Such matters are properly before the court and, before entering a final decree it no doubt will give them careful consideration. In any event the applicant will be under the impelling duty to operate whatever properties may revert to it under the court's order. Our only concern herein is to determine whether the applicant is precluded from resuming operation of such properties unless it obtains a certificate of public convenience and necessity under section 1 (18) of the Interstate Commerce Act. Our conclusion is that the proposal herein is not within the purview of that section. If and when the lease is terminated and the property reverts to the applicant it will have no alternative but to resume operation thereof.

An appropriate order will be entered dismissing the application.

[fol. 75] At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 2nd day of December, A. D. 1944.

Finance Docket No. 14623

Hoboken Rail Road, Ware House and Steamship Connecting Company Operation

Order

Investigation of the matters and things involved in this proceeding having been made, briefs having been filed, and said division having, on the date hereof, made and filed a

report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the application of The Hoboken Rail Road, Ware House and Steamship Connecting Company in the above entitled proceeding, be, and it is hereby, dismissed.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

A true copy: W. P. Bartel, Secretary of the Interstate Commerce Commission.

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[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER NO. 39 TERMINATING LEASES

This matter coming before the court upon the petition of Hoboken Railroad, Warehouse and Steamship Connecting Company for an order permitting the petitioner to serve written notice upon the debtor of the termination of the lease by and between petitioner and debtor, dated June 19, 1906, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same free from any right of the trustee or debtor, and the petition of Hoboken Land and Improvement Company for an order terminating the leases of certain lots, tracts or parcels of land and lands under water in the City of Hoboken, Hudson County, New Jersey, known respectively as Plot A and Plot B, and more particularly described in the aforesaid petition of said Hoboken Land and Improvement Company, and the court having heard the arguments of Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, attorneys for petitioners, and James D. Carpenter, Jr., by Charles B. Collins, attorney for trustee, and Collins and Corbin, by Charles Broadhurst, attorneys for and of counsel with the debtor and Seatrain Lines, Inc., and having read the briefs filed by the respective parties through their aforesaid attorneys; and having considered the matter, and being of the opinion that the prayer of the aforesaid petitions should be granted, and being satisfied that the requirements of the laws relating to the continuous operation of the Railroad have been complied with,

It is on this 19th day of December, 1944, on motion of Wall, Haight, Carey & Hartpence, attorneys for petitioners, Ordered, Adjudged and Decreed as follows:

1. All orders heretofore made herein to the contrary notwithstanding, petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, be and it is hereby authorized and empowered to serve written notice upon Hoboken Manufacturers Railroad Company, debtor, and upon Forrest S. Smith, trustee, of the termination of the [fol. 77] lease by and between said Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof, and at 12 o'clock midnight December 31, 1944 after service of such notices to enter into and upon the demised premises as delineated on the map and described in the inventory and description attached to said lease, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises, and thenceforth hold, possess, and enjoy the same free from any right of the said debtor or trustee to use the demised premises for any purposes whatever.

2. Upon the giving of such notice and entry into and upon the said premises by the said petitioner, any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had never been made.

3. Notwithstanding conflicting claims thereto, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, cash on hand, accounts receivable, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise.

4. Upon the entry into the demised premises hereinabove referred to as Plot A by said Hoboken Land and Improve- [fol. 78] ment Company, the trustee shall leave in the Railroad office building located on said premises such records and documents of the debtor presently in his possession as are necessary to the continued and uninterrupted operation of the railroad, such records and documents to be carefully preserved and used by the petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, in its operation of said railroad, on the express condition; however, that it and said Hoboken Land and Improvement Company afford access to and permit the temporary removal of all such records and documents by the trustee and his duly authorized agents at any time until the further order of this court.

5. That, pending its delivery; the trustee shall have an inventory made of all property, whether real, personal, or mixed, which he is to deliver to Hoboken Railroad, Warehouse and Steamship Connecting Company, and simultaneously with the surrender thereof to it said Hoboken Railroad, Warehouse and Steamship Connecting Company shall deliver to the trustee an itemized receipt, to be prepared by him from said inventory for the property so transferred in accordance with the terms of this order.

6. Locomotive No. 601, ownership of which is claimed by the lessor and by Seatrain Lines, Inc., shall remain in the possession of the trustee until the further order of this Court.

7. The estates granted by Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, debtor, by the aforesaid leases of the land and lands under water, known respectively as Plot A and Plot B, and particularly described as follows:

Plot A

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet [fol. 79] northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would

be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius of two hundred and twenty-four and sixty-five hundredths (224.65) feet one hundred and fifty-six and eight-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteenth Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty three (58,133) square feet more or less.

Plot B

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of [fol. 80] Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred

and eleven (111) feet to the point or place of beginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

be and they are hereby terminated, and the trustee is directed to peaceably and quietly release, surrender and yield unto the said Hoboken Land and Improvement Company, its successors and assigns, all and singular the said demised premises in accordance with the terms of said leases and in accordance with the terms of the indenture between Hoboken Land and Improvement Company and the debtor, dated January 19, 1915.

Guy L. Fake, U. S. D. J.

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[fol. 81] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 21, 1944

Notice is hereby given that Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., a Creditor; in the above entitled proceeding hereby appeals to the United States Circuit Court of Appeals for the Third Circuit, from Order No. 39 entered in this proceeding December 19, 1944 terminating the lease dated June 19, 1906 between Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, the Debtor herein, and the leases to Plot A and Plot B between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company, the Debtor herein.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor. Address: 75 Montgomery Street, Jersey City, N. J.

Collins & Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., Creditor, by Charles W. Broadhurst, a member of said firm and one of the attorneys of record doing business under said firm name. Address: 1 Exchange Place, Jersey City, N. J.

[fol. 82] EXHIBIT D-1

6/12/42

Article Third, Paragraphs B and L and Article Sixth of the Lease Dated June 19, 1906, Between Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company.

1. Article Third, Paragraph (b):

"(b) Throughout the term of this lease, the Lessee shall and will from time to time, and at all times, operate the demised premises as required by all legal enactments from time to time in force and applicable thereto, and keep and maintain the demised premises and all property at any time subject to this indenture or any indenture supplemental hereto, in thorough repair, good working order and condition, and fully supplied with such rolling stock, equipment or other appliances as may be needed fully to develop, maintain and encourage the business of the railroad of the Lessor, supplying and replacing all locomotives and other engines, cars and rolling stock of every description, poles, lines, wires, rails, ties, road-bed, buildings, power houses, power plants or electrical appliances, machines, implements and every appliance whatsoever, so that at all times hereafter, during the term hereby granted, the demised premises and said property may be properly improved, exploited, advanced and advantaged in keeping with the business demands of the community, and as good skill and judgment shall demand, and that the same shall continue to be kept in the same good order and condition at all times thereafter to which the same may at any time be advanced; but the Lessee shall not be required to construct or maintain any power house or power plant on the [fol. 83] demised premises so long as the Lessee shall be able to obtain and shall obtain by purchase the necessary power without such construction. The Lessee shall at all times hereafter make or cause to be made all such improvements of, and betterments on, the demised premises as shall be requisite in order that all freight destined to any point on the lines of railroad subject to this lease or on any connecting switch or

siding or which may be reached thereby or thereover, as well as all freight delivered for transportation at any point reached by the lines of railroad subject to this lease or any connecting switch or siding destined to any point on the lines of railroad subject to this lease or on any connecting switch or siding or which may be reached thereby or thereover, may be expeditiously and efficiently handled without delay.

"The Lessee shall at all times hereafter, at its own expense, keep the railway system of the Lessor equipped with a sufficient number of engines, electric motors and cars, and with all the electrical and other power appliances that may be needed, of whatever character or description the same may be, and keep the power houses, stations, depots and the like fully furnished and equipped, and on hand all necessary poles, machines, machinery and the like, so that in case of the termination of this indenture at any time, the demised premises shall be adequately furnished and equipped to carry on business and continue its operations. All equipment and rolling stock and all other property acquired in compliance with this covenant shall be acquired in the name of the Lessor but without incurring any liability in respect thereof on the part of the Lessor and without incurring any indebtedness the holders of which shall be entitled, under the laws of New Jersey, to have or claim in respect thereof, any lien on the demised premises, but the Lessor shall, on the termination of this lease, pay the Lessee for all [fol. 84] equipment and rolling stock so acquired by the Lessee in compliance with this covenant other than equipment or rolling stock acquired to replace equipment or rolling stock constituting at the beginning of the term, part of the demised premises, the value thereof in the condition in which the same shall then be, to be fixed in case of difference by arbitration."

. . . . . .

2. Article Third, Paragraph (1):

"(1) The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous con-

sent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, nor without like consent expressed as aforesaid, mortgage the interest of the Lessee in the demised premises, save (1) to raise moneys for use exclusively for the improvement and betterment of the demised premises and to an amount not exceeding the actual cost of such improvements and betterments or (2) for the purpose of defraying the cost of the construction by the Lessee, in accordance with the provisions of Article Ninth of this indenture, of an elevated or sub-surface railroad upon the demised premises and to an amount not exceeding the actual cost of such construction. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without [fol. 85] the consent of the Lessor first had and obtained in the manner hereinbefore provided."

* * * * * * *

3. Article Sixth.

"Sixth. During the existence of this lease, the Lessee, subject to the provisions of Article Eighth hereof, may acquire at its own sole cost and expense, any additional property, real or personal, which the Lessee may deem necessary or advisable to acquire for the maintenance or operation of the lines of railroad subject to this indenture or for the improvement of the demised premises, or in extensions thereof; all such additional property shall be acquired in the name of the Lessor, and without incurring liability in respect thereof on the part of the Lessor, or indebtedness, the holders of which might be entitled under the laws of New Jersey to have or claim in respect thereof a lien on the demised premises.

"(a) At the expiration of the term granted by this lease,

"(1) The Lessor shall be entitled to have and retain as its own property, without making any payment in respect thereof, all such additional buildings and structures as within the fourteen years next preceding the expiration of the term, shall have been erected or placed upon the demised premises without the previous written consent and approval of the Lessor.

"(2) For any other additional buildings, or structures, which are of a permanent character, the Lessor shall pay the Lessee the value thereof, to be fixed in case of disagreement by arbitration. Such value shall, for the purposes of this Article, be deemed to be [fol. 86] the difference between the value, for railroad purposes, of the demised premises at the expiration of the term with such buildings thereon, and their value without such buildings, not exceeding in any event the cost of such buildings.

"(3) The Lessor shall be entitled, at its election, to have delivered to it, as its property, any other additional buildings not of a permanent character, or any of such additional personal property, and if the Lessor shall elect so to take the same, the Lessor shall pay the Lessee the value thereof, to be fixed, in case of disagreement, by arbitration. The value of any such buildings or structures shall, for the purposes of this Article, be deemed to be the difference between the value, for railroad purposes, of the demised premises at the expiration of the term, with such buildings thereon, and their value without such buildings or structures, not exceeding in any event, the cost thereof. The Lessee shall give notice in writing to the Lessor not more than ten months nor less than eight months prior to the expiration of the term granted by

this indenture, specifying in detail the buildings and personal property covered by this clause and requiring the Lessor to elect whether the Lessor will attain any of such buildings and any of such additional personal property. The Lessor, if it desires to retain any thereof, shall give notice of such election to the Lessee not less than six months before the expiration of the term. Such notice shall be in writing and shall be sufficiently given if sent through the mails, registered and postage prepaid, addressed to the Lessee, at Hoboken, [fol. 87] New Jersey. Any personal property which the Lessor shall elect not so to take, the Lessee shall not be required to deliver to the Lessor and may remove from the demised premises; any such buildings or structures as it shall elect not so to retain, the Lessee may, at any time prior to the expiration of the term, remove from the demised premises; if not so removed within said period, they shall become the property of the Lessor, without liability on its part to make payment in respect thereof.

"Any loss, damage or injury to any such building or personal property which may happen prior to the expiration of the term granted by this indenture, from whatever cause arising, shall be borne by the Lessee.

"(b) If this lease be terminated, before the expiration of the term granted by this indenture, for any breach or default of the Lessee in the covenants or conditions hereof, the Lessor shall be entitled to the delivery and possession as part of the demised premises of all such additional property, real or personal, and shall not be required, on such termination hereof, or on re-entry, to pay for any of said additional property, real or personal, but shall be entitled to retain the same without payment, as its property.

"The Lessor shall be entitled at the expiration of the term hereby granted, to the delivery and possession as

part of the demised premises, in which term wherever used herein, such additional property shall be deemed included, of all such additional property, real or personal. For failure on the part of the Lessor to make any payment in accordance with the foregoing provisions of clause (2) of subdivision (a) of this Article, [fol. 88] the remedy of the Lessee shall be in damages, the amount thereof to be determined by arbitration. Any payment called for on the part of the Lessor under the provisions of clause (3) of sub-division (a) of this article shall, if the amount thereof be determined by agreement or award prior to the expiration of the term granted by this lease, be made at the expiration of said term; or if the amount thereof be not so determined prior to the expiration of said term, within fifteen days after the amount thereof shall be thereafter so determined by agreement or award.

"In case of failure on the part of the Lessor to make any payment within the period for that purpose above limited, the Lessee may, in lieu of instituting proceedings for the recovery of the value as so determined of any property specified in said clause (3), elect, by written notice to the Lessor, within thirty days after such value shall be so determined and become payable, and in that event shall be entitled, in satisfaction of the liability of the Lessor in respect thereof, to remove from the demised premises within thirty days the buildings not of a permanent character specified in said clause and the value of which the Lessor shall have so failed to pay, and to the redelivery to it by the Lessor on the demised premises of any other personal property specified in said clause, the value of which the Lessor shall have so failed to pay."

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[fol. 89] EXHIBIT D-4

6/12/44

An Indenture made the 19th day of January, in the year of our Lord one thousand nine hundred and fifteen, between Hoboken Land and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the Improvement Company, party of the first part, and Hoboken Manu-

facturers Railroad Company, a corporation of said State of New Jersey, hereinafter termed the Manufacturers Company, party of the second part.

By two certain indentures of lease bearing date the 19th day of June 1906, and hereinafter termed the Leases, the Improvement Company demised and leased unto the Manufacturers Company certain properties of the Improvement Company in the Leases respectively described. For the contents of the Leases, reference is made thereto.

Simultaneously with the execution and delivery of the Leases, Hoboken Railroad Warehouse and Steamship Connecting Company, hereinafter termed the Railroad Company, executed and delivered to the Manufacturers Company a lease, bearing date said 19th day of June, 1906, of the railroad and property of the Railroad Company. For the contents of said lease, and of the supplements thereto, reference is made to said lease and said supplements; and of the contents of all thereof both the parties have knowledge. Said lease is hereinafter termed the Railroad Lease.

The Improvement Company was at said time and ever since has been the owner and holder of practically the entire capital stock of the Railroad Company, and the leases were executed and delivered by the Improvement Company, and accepted by the Manufacturers Company in contemplation of the execution and delivery of the Railroad Lease; and it was the intention of the Improvement Company and of the Manufacturers Company that the Leases should be dependent upon the Railroad Lease and that any breach of [fol. 90] any of the covenants or conditions of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively; and that on the accrual of a right of entry under the Railroad Lease, a right of entry should likewise accrue under the Leases respectively.

For a valuable consideration by the Improvement Company to the Manufacturers Company paid, the receipt of which is acknowledged, and in order to effectuate the intention of the parties, it is agreed as follows:

First. Each of the Leases shall be dependent upon the Railroad Lease as the Railroad Lease has been or may hereafter at any time be supplemented or modified, and each of the Leases, if not theretofore terminated, shall terminate at the expiration of the term of the Railroad Lease or the earlier termination, for any cause or in any manner what-

ever, of the Railroad Lease, and although such termination be by agreement. Any breach of any covenant or condition of the Railroad Lease or of any supplement thereto, or of any instrument of modification thereof, shall be deemed a breach of the covenants or conditions of the Leases respectively and on the accrual of a right of entry under the Railroad Lease as the Railroad Lease has been or may hereafter at any time be supplemented or modified, a right of entry shall likewise accrue under each of the Leases respectively.

Second. In all other respects, each of the Leases is continued, and the Improvement Company and the Manufacturers Company covenant with each other as set out in such lease.

Third. The Manufacturers Company represents and covenants that the Leases and each of them and the leasehold estates demised by the Leases, are, at the time of the execution and delivery hereof, vested in the Manufacturers Company free from encumbrances, and that the Manufacturers Company is authorized to make this agreement.

[fol. 91] In Witness Whereof, the parties to this agreement have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their duly authorized officers as of the day and year first above written.

Hoboken Land and Improvement Company, by Richard Stevens, Vice President.

Attest: Edwin A. S. Brown, Ass't Secretary.

Hoboken Manufacturers Railroad Company, by Charles D. Boyles, President.

Attest: Geo. H. Hobbs, Secretary.

Acknowledged, —— —, ——.

[fols. 92-93] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

## Appendix to Appellee's Brief

ARTICLE FIFTH OF THE LEASE DATED JUNE 19, 1906 BETWEEN HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY AND HOBOKEN MANUFACTURER'S RAILROAD COMPANY

"Fifth. It is mutually covenanted as follows:

* * * * * * *

If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the Lessee or to recover damages for the breach thereof; or

(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, [fol. 94] under the terms hereof, may be then due and unpaid for the use of the demised premises.

* * * * * * *"

EXCERPT FROM PETITION OF FORREST S. SMITH, TRUSTEE—
Filed January 20, 1944

"3.—That subsequent to petitioner's qualification as Trustee, he examined into the affairs of the Debtor and conferred with the representatives of parties in interest and ascertained that the principal executory contract to which the Debtor is a party consists of a ninety-nine year lease dated June 19, 1906 between Hoboken Railroad Warehouse and Steamship Connecting Company as lessor and the Debtor as lessee embracing the main line of railroad, including all rights of way, station and terminal grounds and other lands and interests in lands and the majority of the rolling stock and equipment presently operated by the Debtor. Petitioner also ascertained that other leases and agreements vitally affecting the operations of the Debtor existed. He also learned and believes that one of the principal reasons for the filing of the petition for the reorganization of the Debtor was its inability to satisfy the total rent demanded by Hoboken Railroad Warehouse and Steamship Connecting Company under the aforesaid lease. * * *"

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

In the Matter of HOBOKEN MANUFACTUERS RAILROAD COMPANY, Debtor.

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

NOTICE OF MOTION FOR STAY

To Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Appellees, 15 Exchange Place, Jersey City 2, N. J.

SIRS:

Please Take Notice that on Thursday, December 28, 1944 at 11:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned will apply to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, at the United States Court House, Ninth and Chestnut Streets, Philadelphia, Pennsylvania, for an Order staying Hoboken Railroad, Warehouse and Steamship Connecting Company from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it [fol. 96] and Hoboken Manufacturers Railroad Company, including all additional property, real or personal, acquired by the lessee during the existence of said lease and which has become part of the demised premises, and also staying the termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers

Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, under the terms of Order No. 39, entered December 19, 1944 by the United States District Court for the District of New Jersey, pending the determination of the appeal which has been taken by Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, to the United States Circuit Court of Appeals for the Third Circuit from said Order No. 39, and

Take Further Notice that the annexed petition, together with certified copies of the opinion and Order No. 39 therein referred to as Schedules "A" and "B" will be submitted to the Court at the hearing of the above application by the undersigned in support thereof.

Dated Jersey City, N. J., December 26, 1944.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor, Address: 75 Montgomery Street, Jersey City 2, N. J. Collins and Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., a Creditor, By Charles W. Broadhurst, a member of said firm and one of the attorneys of record doing business under said firm name, Address: 1 Exchange Place, Jersey City 3, N. J.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

APPELLANTS' PETITION FOR STAY

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

1. Your petitioners, Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., feeling themselves aggrieved by a certain Order No. 39 made on December 19, 1944 by the United States District Court for the District of New Jersey in the matter of Hoboken Manufacturers Railroad Company, Debtor, did, on December 21, 1944, duly file a notice of appeal to this Honorable Court from said Order with the Clerk of the United States District Court for the District of New Jersey, a copy of which notice of appeal was thereupon on the same day served upon Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, the Appellees herein.

2. The aforesaid Order No. 39 was granted on the motions of Hoboken Railroad, warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company after entry of an opinion rendered by Honorable [fol. 98] Guy L. Fake for the United States District Court for the District of New Jersey and filed August 4, 1944,

wherein certain motions for leave to serve notice terminating a lease dated June 19, 1906 between Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, the said Debtor, and also terminating two other leases between Hoboken Land and Improvement Company and the said Debtor were granted. A true copy of the aforesaid opinion is annexed hereto, made a part hereof and marked Schedule "A".

3. By the terms of the aforesaid Order No. 39, of which a true copy is annexed hereto, made a part hereof and marked Schedule "B", Hoboken Railroad, Warehouse and Steamship Connecting Company is authorized and empowered to serve written notice upon said Debtor and said Trustee of the termination of the lease between it and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof and at 12 o'clock midnight, December 31, 1944 to enter into and upon the demised premises, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises and thenceforth hold, possess and enjoy the same free from any right of the said Debtor or Trustee to use the demised premises for any purposes whatever.

4. On December 21, 1944, and immediately after the filing of the aforesaid notice of appeal herein your petitioners noticed a motion before Judge Fake for a stay of the operation of said Order No. 39 pending said appeal or, in the alternative, until an application for such a stay might be heard and determined by this Honorable Court. Said application was heard before Judge Fake on Tuesday, December 26 and after hearing arguments of counsel for the Appellants and the Appellees an Order was entered in the [fol. 99] United States District Court for the District of New Jersey denying a stay pending the instant appeal and reciting the grounds for such denial. A true copy of the aforesaid order, dated December 26, 1944 is annexed hereto, made a part hereof and marked Schedule "C".

5. Hoboken Manufacturers Railroad Company, the Debtor herein, filed its petition for reorganization under Section 77 of the Bankruptcy Act, as amended, in the United States District Court for the District of New Jersey on July 26, 1943 and on the same day an Order was

entered by said Court approving the filing of said petition. Said Debtor is a corporation of New Jersey and a common carrier by railroad subject to the Interstate Commerce Act. The only railroad which said Debtor operates is a switching line along the waterfront of Hoboken, New Jersey. Its line connects on the north with the line of the Erie Railroad Company and through this connection and also through a float bridge, it interchanges freight with other trunk line railroads serving New York Harbor. One primarily to war traffic, after accruing all known claims and operating expenses, including all rent required to be paid under the aforesaid leases with Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, the railroad operations have been currently producing a profit of between $4,000 and $5,000 monthly under the management of the Trustee.

6. The major part of the Debtor's right of way and line of railroad is held by it under the lease dated June 19, 1906 for a term of 99 years from Hoboken Railroad, Warehouse and Steamship Connecting Company. A number of disputes have arisen between Hoboken Railroad, Warehouse and Steamship Connecting Company as landlord under the lease with it and the Trustee of the property of the Debtor concerning the ownership of and title to [fol. 100] certain parcels of real estate and personal property used for railroad purposes because of the terms and conditions relating to forfeiture of property upon termination of said lease after a breach thereof.

7. There is now pending before a Special Master appointed by the United States District Court for the District of New Jersey on the petition of the Trustee for instructions and cross reclamation petitions by Seatrain Lines, Inc. and Hoboken Railroad, Warehouse and Steamship Connecting Company, respectively, for determination and report the question of the ownership of Locomotive No. 601 as well as the question of the Court's jurisdiction to determine such ownership. The Trustee has, pursuant to the instructions of the lower court, continued in possession of and used said locomotive in the operation of the railroad pending such determination.

8. Judge Fake at page 2 of his opinion, see Schedule "A", quotes the pertinent part of the Hoboken Railroad,

Warehouse and Steamship Connecting Company lease, which said landlord claims was breached by the qualification of the Trustee, and at page 5 thereof recites the first question to be disposed of as whether the "debtor-lessee" had any property in the lease when it filed its petition, and the second and final question as: "Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided?" Both questions are answered in the affirmative, although the Court at page 4 of the opinion recognized the rule of law followed in the United States Circuit Court of Appeals for the Second Circuit in *Palmer v. Palmer*, 104 Fed. (2nd) 161, if followed here would produce a negative answer to the second question as above quoted. Our problem is also recognized by Judge Fake in his opinion as one of first instance, he having found no case of like tenor in this circuit or in the case law of New Jersey.

[fol. 101] 9. The time within which the Debtor is to file its plan of reorganization has been extended by Order No. 31 entered on August 14, 1944 to February 24, 1945. In the event Order No. 39 is not reversed and the properties under the foregoing leases revert thereunder to Appellees herein, then all possibility of reorganizing the railroad of the Debtor will fail.

10. Your petitioners are of the opinion and therefore allege that the interests of all parties to the instant reorganization will be best served by the continued operation of the railroad by the Trustee under the control and direction of the court pending determination of this appeal, subject to such terms as this Honorable Court may prescribe regarding continued payment of rent or other compensation to the Appellees and setting aside of profits, until a decision is reached as this Honorable Court may fix.

Wherefore your petitioners pray that an order may be entered herein staying Hoboken Railroad, Warehouse and Steamship Connecting Company from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it and Hoboken Manufacturers Railroad Company, including all additional prop-
[fol. 102] erty, real or personal, acquired by the lessee during the existence of said lease and which has become

part of the demised premises, and also staying the termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, under the terms of Order No. 39, entered December 19, 1944 by the United States District Court for the District of New Jersey, pending the determination of this appeal from said Order No. 39.

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, by James D. Carpenter, Jr., Attorney. Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., a Creditor, by Collins & Corbin, Attorneys.

STATE OF NEW JERSEY,
County of Essex, ss:

Forrest S. Smith, of full age, being duly sworn according to law, upon his oath deposes and says:

That I am one of the petitioners in the foregoing petition named and Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; I have read said petition, know the contents thereof, and the matters and things therein contained are true as I verily believe.

Forrest S. Smith.

Subscribed and sworn to before me this 26 day of December, 1944. W. W. Heironimus, a Notary Public of New Jersey. (Seal.)

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[fol. 103] SCHEDULE "A"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

OPINION—No. 4873a

In the Matter of HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Debtor

*Appearances:*

Messrs. Carpenter, Gilmour & Dwyer, by James D. Carpenter, Jr., Esq., and Charles B. Collins, Esq., Attorneys for Trustee.

Messrs. Collins & Corbin, by Edward A. Markley, Esq., Attorneys for Hoboken Manufacturers' Railroad Company and Seatrain Lines, Inc.

Messrs. Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Esq., Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company.

FAKE, District Judge:

This is a Railroad Reorganization Proceeding under Title 11 U. S. C. A. Section 205.

The present issues arise on a motion to permit the lessor to terminate a ninety-nine year railroad lease executed June 19, 1906, on the ground of a breach of the terms of the lease. The clause relied upon by the lessor, insofar as pertinent, reads as follows:

> [fol. 104] "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

It is urged that upon the qualification of the trustee herein he acquired such an interest in the lease as to constitute a breach or violation of the conditions above quoted.

It will be noted that this clause is not worded in the exact language found in the usual bankruptcy forfeiture clauses nor is it worded as are the general run of the forfeiture clauses directed against assignment without the consent of the lessor. Here a default is contemplated not only if any sale or transfer of the demised premises is made by the lessee without the authorization of the lessor, but also

if a transfer is brought about by any proceeding at law or in equity wherein the lessee is a party, whereby any of the duties of the lessee may be "encumbered, abrogated or in any manner altered."

Jones on Landlord and Tenant, Section 466, is cited with apparent approval in Gazlay vs. Williams, 210 U. S. 41. That section reads as follows: "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, *but the* [fol. 105] *covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.*" And that text so approved is now given the strength of statutory sanction by Title 11 U. S. C. A. Sec. 110b, wherein it is enacted that "*an express covenant that an assignment by operation of law* or the bankruptcy of a specified party thereto or of either party *shall terminate the lease or give the other party an election to terminate the same shall be enforceable.*"

Title 11 U. S. C. A. Section 205(c)(2) provides that "The trustee * * * shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, * * *." This means that title vests in the trustee in a railroad reorganization proceeding to the same extent that it vests in a trustee in a general bankruptcy proceeding. As to the latter the United States Supreme Court held is Isaacs, Trustee vs. Hobbs Tie & Timber Co., 282 U. S. 734, that "all property owned and possessed by the bankrupt vests in the trustee." These last quoted words are so clear as to require no further attempts at elucidation. The language "all property owned and possessed by the bankrupt" does not except leases because they may happen to carry a burden with them. They may be abandoned. They do vest however in the trustee.

Turning now to Section 110(b) of Title 11, it is found, with relation to unexpired leases of real property, that the trustee is allowed 60 days, (or an extended period) after adjudication to assume or reject such leases. This is to say, in the instant case, the title of the debtor-lessee be- [fol. 106] came vested in the trustee subject to being divested by a rejection. This should be read in connection

with Title 11 U. S. C. A. 110(a) which enacts that the trustee is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition."

The case of Palmer vs. Palmer, 104 Fed. 2nd 161, is relied on by the debtor-lessee for the proposition that, "A lease, being property cum onere, does not pass to a trustee in bankruptcy, unless he adopts it. * * *." "Yet" (says Judge Learned Hand in the opinion) "if the question were to arise for the first time, it would be a little hard to see by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term * * *. * * * insolvency ought not to give the lessee's creditors greater rights to possession than the lessee himself enjoyed; * * *. This necessity should be in no sense affected by the fact that the property may be a railroad, * * *. The question does not concern the public, but is a dispute between two groups having interests in the property * * *." The Judge then says: "Nevertheless, the contrary has been generally held; * * *." The foregoing quotations are extracted from the opinion in the Palmer case, because they disclose the individual views of one whose opinions are held in the highest esteem, and they seem to indicate a reluctance on his part to follow the law as he found it. This reluctance however was dissipated in the rule of stare decisis as he found it in his circuit based upon In re Frazin, 183 Fed. 28 (1910). No case of like tenor has been found in this circuit or in the case law of New Jersey. This court therefore is free to approach the problem raised as one of first instance.

[fol. 107] The lease contains a further clause providing that in the event of a breach of covenant and the lapse of thirty days after notice of termination given by the lessor, the lessor may enter. The notice so provided has been served and thirty days have elapsed.

The first question to be disposed of here is: Did the debtor-lessee have any property in the lease at the time it filed its petition herein? The answer is, Yes. It had a leasehold subject to forfeiture on notice in the event of a transfer of the leasehold by operation of law in any proceeding wherein the lessee might be a party. Nothing else appearing, that estate is the specific estate which the trustee herein took upon his qualification.

The second and final question is: Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided? Here again the answer is, Yes.

A reading of the clause under consideration discloses that the character or quality of that which is contemplated as passing by operation of law must be such as would transfer, encumber, abrogate or alter any of the rights, duties or obligations of the lessee.

The transfer, here by operation of law, has placed the trustee in possession and he is quite a different occupant than the lessee named in the lease. Moreover when the trustee took, the result of his taking was to abrogate and alter the terms of the lease by reason of Section 110(b) of Title 11 of the Act, which in effect reads a sixty day period into the lease without the lessor's consent, within which [fol. 108] time an adoption or rejection may take place. Surely this would force a different contract on the parties than that into which they each entered with their eyes open. Such a result cannot be justified either by the statutory law, the case law in this circuit, or on the basis of sound reason.

It appears that the trustee herein petitioned the court for leave to adopt the lease while the instant motion was pending and the prayer of the petition was granted. It is argued from this that such adoption resulted in the transfer of the title of the lease in breach of the terms of the lease. By reason of the conclusions above arrived at, I deem it not necessary to pass upon the issue thus raised other than to say: that since the debtor-lessee's title passed to the trustee prior to the adoption, nothing was gained or lost by the adoption insofar as present issues are involved. The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with.

[fol. 109] [Endorsed:] United States District Court, District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. Opinion No. 4873a. G. L. Fake, District Judge. Filed: August 4th, 1944.

[fol. 110] SCHEDULE "B"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 4873A

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

ORDER NO. 39 TERMINATING LEASES

This matter coming before the court upon the petition of Hoboken Railroad, Warehouse and Steamship Connecting Company for an order permitting the petitioner to serve written notice upon the debtor of the termination of the lease by and between petitioner and debtor, dated June 19, 1906, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same free from any right of the trustee or debtor, and the petition of Hoboken Land and Improvement Company for an order terminating the leases of certain lots, tracts or parcels of land and lands under water in the City of Hoboken, Hudson County, New Jersey, known respectively as Plot A and Plot B, and more particularly described in the aforesaid petition of said Hoboken Land and Improvement Company, and the court having heard the arguments of Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, attorneys for petitioners, and James D. Carpenter, Jr., by Charles B. Collins, attorney for trustee, and Collins and Corbin, by Charles Broadhurst, attorneys for and of counsel with the debtor and Seatrain Lines, Inc., and having read the briefs filed by the respective parties through their aforesaid attorneys, and having considered the matter, and being of the opinion that the prayer of the aforesaid petitions should be granted, and being satisfied that the requirements of the laws relating to the continuous operation of the Railroad have been complied with,—

It is on this 19th day of December, 1944, on motion of [fol. 111] Wall, Haight, Carey & Hartpence, attorneys for petitioners, Ordered, Adjudged and Decreed as follows:

1. All orders heretofore made herein to the contrary notwithstanding, petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, be and it is hereby

authorized and empowered to serve written notice upon Hoboken Manufacturers Railroad Company, debtor, and upon Forrest S. Smith, trustee, of the termination of the lease by and between said Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof, and at 12 o'clock midnight December 31, 1944 after service of such notices to enter into and upon the demised premises as delineated on the map and described in the inventory and description attached to said lease, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises, and thenceforth hold, possess, and enjoy the same free from any right of the said debtor or trustee to use the demised premises for any purposes whatever.

2. Upon the giving of such notice and entry into and upon the said premises by the said petitioner, any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had never been made.

3. Notwithstanding conflicting claims ~~thereto~~, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, [fol. 112] cash on hand, accounts receivable, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise.

4. Upon the entry into the demised premises hereinabove referred to as Plot A by said Hoboken Land and Improvement Company, the trustee shall leave in the Railroad office building located on said premises such records and docu-

ments of the debtor presently in his possession as are necessary to the continued and uninterrupted operation of the railroad, such records and documents to be carefully preserved and used by the petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, in its operation of said railroad, on the express condition, however, that it and said Hoboken Land and Improvement Company afford access to and permit the temporary removal of all such records and documents by the trustee and his duly authorized agents at any time until the further order of this court.

5. That, pending its delivery, the trustee shall have an inventory made of all property, whether real, personal, or mixed, which he is to deliver to Hoboken Railroad, Warehouse and Steamship Connecting Company, and simultaneously with the surrender thereof to it said Hoboken Railroad, Warehouse and Steamship Connecting Company shall deliver to the trustee an itemized receipt, to be prepared [fol. 113] by him from said inventory for the property so transferred in accordance with the terms of this order.

6. Locomotive No. 601, ownership of which is claimed by the lessor and by Seatrain Lines, Inc., shall remain in the possession of the trustee until the further order of this Court.

7. The estates granted by Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, debtor, by the aforesaid leases of the land and land-under water, known respectively as Plot A and Plot B, and particularly described as follows:

Plot A

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth

Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius of two hundred and twenty-four and sixty-five hundredths (224.65) feet one hundred and fifty-six and eighty-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteenth Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty-three (58,133) square feet more or less."

[fol. 114] Plot B

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet to the point or place of beginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

be and they are hereby terminated, and the trustee is directed to peaceably and quietly release, surrender and yield unto the said Hoboken Land and Improvement Company, its successors and assigns, all and singular the said demised premises in accordance with the terms of said leases and in accordance with the terms of the indenture between Hoboken Land and Improvement Company and the debtor, dated January 19, 1915.

Guy L. Fake, U. S. D. J.

[fol. 115] [Endorsed:] United States District Court, District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. No. 4873a. In Proceedings for the Reorganization of a Railroad. Order No. 39. Terminating Leases. Wall, Haight, Carey & Hartpence, Attorneys for petitioners, 15 Exchange Place, Jersey City, N. J. Filed Dec. 19, 1944.

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[fol. 116] SCHEDULE "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

No. 4873A

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

Order No. 43

This matter coming before the Court on the duly noticed motion of Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company and Sea Train Lines, Inc., a creditor, for a stay pending the appeal to the Circuit Court of Appeals for the Third Circuit, or in the alternative, until an application may be made thereto for such a stay, of the operation of Order No. 39 entered herein on December 19, 1944, whereby Hoboken Railroad Warehouse and Steamship Connecting Company was authorized to give notice to the Debtor and Trustee terminating its lease of June 19, 1906 at 12 o'clock mid-

night on December 31, 1944, and to enter into the demised premises, including all additional property, real and personal, acquired by said Lessee during the existence of said lease and which has become part of the demised premises and the estates granted by Hoboken Land and Improvement Company under leases for Plot A and Plot B dated June 19, 1906, were also terminated, and the Court having heard the arguments of James D. Carpenter, Jr., by Charles B. Collins, Attorney for the Trustee, and Collins & Corbin, by Charles W. Broadhurst, Attorneys for the Debtor and Seatrain Lines, Inc., for the motion, and Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, in opposition thereto, and being of the opinion that said motion should be denied for the reasons set forth in a stenographic transcript annexed hereto and on the terms [fol. 147] suggested by counsel for said Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company,

It Is On This 26th Day Of December, 1944,

Ordered that the aforesaid motion for a stay of the operation of Order No. 39 pending the appeal to the Circuit Court of Appeals for the Third Circuit be and the same is hereby denied on the following terms:

1. Pending the determination of said appeal Hoboken Railroad Warehouse and Steamship Connecting Company shall not sell, lease, mortgage or otherwise transfer or encumber the railroad property without the approval and order of this Court.

2. Pending the determination of said appeal Hoboken Railroad Warehouse and Steamship Connecting Company shall not declare or pay any dividends on its capital stock out of profits from the operation of the railroad earned subsequent to December 31, 1944.

3. Pending the determination of said appeal Hoboken Land and Improvement Company shall not sell, lease, mortgage or otherwise transfer or encumber the lands and premises known as Plot A and Plot B and particularly described in said Order No. 39, without the approval and order of this Court, except that said Hoboken Land and Im-

provement Company may lease said lands and premises to Hoboken Railroad Warehouse and Steamship Connecting Company for use in connection with the operation of the railroad.

Guy L. Fake, U. S. D. J.

[fol. 118] "The Court (Orally, at close of argument): Upon considering the argument that has been made here this morning, I conclude that the motion for a stay should be denied upon the terms suggested by Senator O'Mara.

"It is true the issues involved with relation to the leases have been before the Court for many months, and it was only after a most painstaking and careful study that I was led to the conclusion set forth in the opinion which I filed some months ago. If I had any doubt in my own mind as to the correctness of my opinion I would be inclined to grant a stay. It is my thought in this connection that an appeal having been taken, any stay should be made by the appellate court and not by this Court, under the peculiar facts and circumstances that are present in this case. This railroad differs from railroads generally. It is a very unique set-up. And in view of the terms and conditions outlined by Senator O'Mara, it is my thought that no evil can possibly follow the issuance of such an order. However, you should be free to make your application to the Circuit Court of Appeals for a stay.

"I think of nothing further at the moment that I would like to put upon the record."

Endorsements: Petition and Notice of Motion for Stay. Received & Filed December 27, 1944. Wm. P. Rowland, Clerk.

[fol. 119] [Endorsed:] In the District Court of the United States for the District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. No. 4873A. In Proceedings for the Reorganization of a Railroad. Order No. 43. James D. Carpenter, Jr., Esq., Attorney for Trustee, 75 Montgomery St., Jersey City 2, New Jersey; Collins & Corbin, Esqs., Attorneys for Debtor and Seatrain Lines, Inc., a Creditor, 1 Exchange Place, Jersey City 3, New Jersey.

[fol. 120] Service of the within Notice of Motion for Stay and Petition is hereby acknowledged this 26th day of December, 1944.

Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Appellees.

[Endorsed:] 8812. United States Circuit Court of Appeals for the Third Circuit. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. Forrest S. Smith, Trustee, etc., et als., Appellants, vs. Hoboken Railroad, Warehouse and Steamship Connecting Company; et al., Appellees. Petition and Notice of Motion For Stay. James D. Carpenter, Jr., 75 Montgomery Street, Jersey City 2, N. J.; Collins & Corbin, 1 Exchange Place, Jersey City 2, N. J., Attorneys for Appellant-Petitioners. Received & Filed Dec. 27, 1944. William P. Rowland, Clerk.

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[fol. 121] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8812

In the Matter of HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Co., Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and Hoboken Land and Improvement Company

And afterwards, to wit, the 28th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Appellants' Petition for Stay, before the Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the

Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 122] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8812

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

Before Jones and Goodrich, Circuit Judges

ORDER FOR STAY

Application having been made pursuant to notice duly served for an order staying the operation of Order No. 39 of the United States District Court for the District of New Jersey, pending the hearing and determination of the Appeal taken from said Order to this Court, and the matter having been heard in the presence of James D. Carpenter, Jr. by Charles B. Collins, attorney for Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; Collins and Corbin by Charles W. Broadhurst, attorney for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., Creditor; and Wall, Haight, Carey & Hartpence by Edward J. O'Mara, attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken

Land and Improvement Company, and good cause appearing for the granting of said stay.

[fol. 123] It is on this twenty-eighth day of December, 1944 ordered that Hoboken Railroad, Warehouse and Steamship Connecting Company be and it is hereby stayed from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it and Hoboken Manufacturers Railroad Company, including all additional property, real or personal, acquired by the lessee during the existence of said lease and which has become part of the demised premises, and termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, be and the same is also stayed, pending the determination of the Appeal taken herein from said Order No. 39, which was entered by the United States District Court for the District of New Jersey on December 19, 1944.

By the Court, Jones, Circuit Judge.

Endorsements: Order Granting Stay. Received and Filed Dec. 28, 1944. William P. Rowland, Clerk.

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[fol. 124] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1944

No. 8812

In the Matter of Hoboken Manufacturers Railroad Company, Debtor

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company

And afterwards, to wit, 6th day of March, 1945, come the parties aforesaid by their counsel aforesaid, and this

case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of July, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8812

IN the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

v.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and Hoboken Land and Improvement Company

Appeal from Order of the District Court of the United States for the District of New Jersey

Before Biggs, Maris and Goodrich, Circuit Judges

OPINION OF THE COURT—Filed July 17, 1945

By BIGGS, Circuit Judge:

The substantial question presented by the appeal at bar is a narrow one: Is the landlord-lessor, one of the appel- [fol. 126] lees herein, entitled to terminate a ninety-nine year lease made in 1906 to the debtor-lessee of a railroad right-of-way and its subservient properties and resume occupancy, because of a breach of terms of the lease? Two "tie-in" leases by their terms must stand or fall with the principal lease just referred to and need not be discussed in this opinion.

The pertinent language of the indenture executed on June 19, 1906 is as follows: "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, * * * without the previous consent of the Lessor. * * * This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, * * * whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained. * * *." The debtor is in reorganization proceedings instituted pursuant to Section 205 of Title 11 of the United States Code, Section 77 of the Bankruptcy Act. A trustee was appointed for the debtor. He adopted the lease pursuant to the direction of the court below. It should be pointed out that Section 110b of Title 11 provides that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party * * * [to a lease], * * * shall terminate the lease * * * shall be enforceable." Subparagraph (1) of Section 205 provides: "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor, and the right and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The appellant trustee, makes three contentions. He contends first that only if a lease expressly provides that it shall terminate on bankruptcy can an adjudication in bank- [fol. 127] ruptcy effect a termination, citing such authorities as Gasley v. Williams, 210 U. S. 41, and in Re Prudential Lithograph Co., 265 F. 869, aff'd 270 F. 469, cert. den. 256 U. S. 692. He concedes that an express provision in a lease giving the lessor the right to terminate the lease on the bankruptcy of the lessee is enforceable. See In re Wil-low Cafeterias, 95 F. 2d 306. It is clear that in the case at bar there was a breach of the lease for the rights, duties and obligations of the lessee were transferred, abrogated and altered by the assumption by the trustee of the rights of the debtor in the property. Though the lease does

not refer to bankruptcy it does provide expressly for forfeiture if a transfer of the lease or an underletting of the premises is effected, unauthorized by the lessor, in any proceeding to which the lessee is a party "whether at law or in equity or otherwise."

This language of the lease falls within the purview of Section 110b of Title 11 of the United States Code. The parties to the lease obviously had in mind an equity receivership or an ordinary proceeding in bankruptcy as such proceedings existed in 1906 and which might have brought about a transfer or an "underletting" of the premises by operation of law and contrary to the wishes of the landlord-lessor. The provisions of subparagraph (l) of Section 205 categorize the proceeding at bar and the rights of persons in connection with property of the debtor as if the proceeding were one in which a voluntary petition in bankruptcy had been filed and an adjudication had been made thereon. The decision of the Supreme Court in Finn v. Meighan, —— U. S. ——, is helpful, though in that case the pertinent provision of the lease specified the filing of a "petition in bankruptcy." Since the phrase "whether at law or in equity or otherwise," employed to denominate the proceedings which may terminate the lease by breach of its provisions must be deemed to include ordinary bankruptcy proceedings, we have no difficulty in concluding, as did the court below,[1] that the lease was breached when it [fol. 128] was adopted by the trustee and the landlord-lessor is entitled to re-enter the premises.

The appellant's second contention is that the termination of the lease and the order allowing re-entry by the lessor were premature because they preceded consideration of a plan of reorganization. This position seems also to be without merit. The appellant relies on the principle enunciated in Continental Bank v. Rock Island Ry., 294 U. S. 648, but we think that decision is inapplicable. The Rock Island system consisted of over 8,000 miles of right-of-way running through many States. The railroad had a complicated financial structure and it would have been impossible to prepare a plan of reorganization if there had been recurring sales of its securities. Consequently the court enjoined such sales pending the submission of a plan of

[1] See 56 F. Supp. 187.

reorganization. The debtor in the case at bar is a short switching railroad having nine miles of main stem track. It has no outstanding bonds or other evidences of indebtedness. No securities are involved. All of the debtor's stock is owned by Seatrain Lines, Inc. It appears that the Section 77 petition was filed by the debtor because it desired to procure a lease of the railroad on more favorable terms. Under the circumstances it can scarcely be held that the court below has abused its discretion in permitting a reentry by the landlord.

The final point raised by the trustee is that the order complained of is improvident because it requires that all of the property of the debtor in the possession or control of the trustee and used for railroad purposes, be delivered to the landlord. The trustee points out that there are undetermined claims in respect to some of this property. But the property subject to dispute is inconsequential, consisting only of two lengths of track 265 feet in length, leading to a dead-end siding, and another 20 foot length of track, leading to a float-bridge. But the order complained of is a wise one for it permits the operation of this small trackage as a part of the main stem of the railroad and in addi- [fol. 129] tion provides means whereby the contested claims may be disposed of promptly.

The order appealed from is affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 130] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1944

No. 8812

In the Matter of Hoboken Manufacturers Railroad Company, Debtor

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this case be, and the same is hereby affirmed with costs.

By the Court, Biggs, Circuit Judge.

July 17, 1945.

Endorsements: Order Affirming District Court Order. Received & Filed July 17, 1945. Wm. P. Rowland, Clerk.

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[fol. 131] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellants and Appellees, as constituting the portions of the record before this court at argument; and proceedings in this court, in the Matter of

Hoboken Manufacturers Railroad Company, Debtor, No. 8812 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 31st day of July in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The Solicitor General is invited to file a brief and participate in the oral argument as amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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## No. 384

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FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR, ET AL.,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, AND HOBOKEN LAND AND IMPROVEMENT COMPANY

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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JAMES D. CARPENTER,
EDWARD A. MARKLEY,
PARKER MCCOLLESTER,
*Counsel for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 384

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FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR; THE DEBTOR, HOBOKEN MANUFACTURERS RAILROAD COMPANY; AND SEATRAIN LINES, INC., A CREDITOR,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, AND HOBOKEN LAND AND IMPROVEMENT COMPANY,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioners, Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; the debtor Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., Stockholder and a Creditor of the

Debtor, respectfully present this petition for a writ of certiorari to review the final decision of the United States Circuit Court of Appeals for the Third Circuit, rendered and filed July 17, 1945, which affirms Order No. 39 of the United States District Court for the District of New Jersey in proceedings under Section 77 of the Bankruptcy Act (Title 11, U. S. Code, Section 205) for the reorganization of the Hoboken Manufacturers Railroad Company.

## Summary and Short Statement of the Matter Involved

Hoboken Manufacturers Railroad Company (herein generally referred to as the Debtor or Lessee) is a New Jersey corporation operating a switching railroad line to New York Harbor waterfront in Hoboken, New Jersey. It is a common carrier engaged almost exclusively in the transportation of freight in interstate and foreign commerce subject to the provisions of the Interstate Commerce Act (U. S. Code, Title 49). Its line of railroad connects on the north with the line of the Erie Railroad and through this connection and a float bridge it interchanges freight with other trunk line railroads serving New York Harbor (R. 15a). It serves the piers of numerous steamship lines and the plants of important industries along the New Jersey waterfront.

Seatrain Lines, Inc. (hereinafter referred to as Seatrain) owns all of the stock of Hoboken Manufacturers Railroad Company, Debtor, except directors' qualifying shares, is a very substantial Creditor of Debtor, and is itself a common carrier by water, party to through routes with Debtor, and as such interested in its continued operation.

On July 26, 1943, Hoboken Manufacturers Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act (U. S. Code, Title 11, Section 205)

in the United States District Court for the District of New Jersey (R. 15a). On the same day said Court made its Order No. 1 approving the petition, continuing the Debtor in possession of its property and restraining all persons from taking any action to interfere with such possession or with the continued operation of the railroad (R. 23a ff).

By Order No. 5 entered on October 11, 1943, the Court appointed Forrest S. Smith, Trustee of the Debtor (R. 35a ff). The Interstate Commerce Commission approved this appointment by its Order of November 4, 1943 (R. 38a), and the Trustee duly qualified by filing his approved bond and oath on November 12, 1943, and thereupon, by direction of the Court, entered into possession of the debtor's property.

The major part of debtor's right of way and line of railroad is held by it under a ninety-nine year lease dated June 19, 1906, from Hoboken Railroad Warehouse and Steamship Connecting Company (hereinafter referred to as the "Connecting Company"), (Ex. D-1, R. 82a ff). Two additional pieces of land known respectively as Plots A and B are held under ninety-nine year leases likewise dated June 19, 1906 from Hoboken Land and Improvement Company (hereinafter referred to as the "Improvement Company"), the parent corporation of the Connecting Company (R. 61a ff). By a "tie-in" indenture dated January 19, 1913, the Debtor agreed that said leases of Plot A and Plot B should terminate on the expiration or earlier termination of the Connecting Company lease. The Debtor also owned in fee other parcels of land which were small but vital for the operation of the railroad.

The lease from the Connecting Company (Ex. D-1, R. 82a ff) contained a covenant whereby the Debtor agreed that it would not sell or transfer the lease or underlet the de-

mised premises without the previous consent of the lessor and provided, further, that:

> "this covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the lessee in any proceeding, whether at law or in equity or otherwise, to which the lessee may be a party, whereby any of the rights, duties and obligations of the lessee shall or may be transferred, encumbered, abrogated or in any manner altered without the consent of the lessor first had and obtained * * *."

There was no express reference to bankruptcy, to a petition in bankruptcy or to a petition for reorganization. The lease provided that if the lessee (the Debtor) should fail to observe any covenant of the lease and the default should continue for "thirty days after notice from the Lessor of such default and requiring the Lessee to remedy the same", the Lessor, the Connecting Company, at its option, might give notice to terminate the lease (R. 43a, 44a).

On February 8, 1944, the Connecting Company noticed a motion and filed a petition in the District Court (R. 41a ff) praying for an order modifying the restraints in Order No. 1 (R. 23a, 33a) and Order No. 5 (R. 35a) to permit it to serve written notice upon the Debtor of the termination of its lease, claiming that the qualification of the Trustee and his entering into possession of the Debtor's property, pursuant to the Court's order, constituted a breach by the Debtor of the aforesaid covenant (R. 40a-46a). The motion was argued before Judge Fake on February 14, 1944, and briefs were thereafter submitted.

Meanwhile the Debtor had sought and had from time to time been granted by the District Court additional time within which to file a plan of reorganization. The Trustee on May 26, 1944, noticed a motion and filed a petition in

the District Court (R. 48a ff) reciting the circumstances that then prevented determination as to whether it would ultimately be for the benefit of Debtor's estate and its creditors for executory contracts to be adopted or to be rejected, and praying that, because executory contracts adopted by the Trustee may be rejected in any plan of reorganization, while executory contracts, if rejected by the Trustee, would not be available in a plan of reorganization, he be instructed to elect to continue in force and adopt all executory contracts, including the leases above described. Judge Fake, by Order No. 27 (R. 51a) directed the Trustee to adopt and continue in force any and all executory leases and contracts to which the Debtor was a party, including the leases of June 19, 1906. No appeal from this order was taken by any party. Notice of adoption of such leases, pursuant to the order, was given by the Trustee to the Connecting Company and the Improvement Company (R. 52a and 53a).

Thereafter, on August 4, 1944, Judge Fake filed his opinion (R. 55a ff). Although he had directed the Trustee to adopt and continue the leases in effect, he nevertheless found that the covenant against unauthorized transfer in the main stem lease had been previously breached by the qualification of the Trustee and his entry into possession of the Debtor's property. He ruled "that since the Debtor-lessee's title passed to the Trustee prior to the adoption, nothing was gained or lost by the adoption insofar as present issues are involved (R. 59a)". He therefore granted the Connecting Company's motion to terminate the lease "to take effect upon production to the Court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with".

This last phrase of Judge Fake's opinion had reference, among other things, to the provisions of Section 1 (18)

the Interstate Commerce Act (U. S. Code, Title 49) prohibiting any party from acquiring or operating a railroad in interstate commerce without having first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the operation of such railroad. Neither the Connecting Company nor the Improvement Company had obtained such a certificate. The Connecting Company thereafter filed with the Interstate Commerce Commission a petition for the issuance to it of a certificate of convenience and necessity under Section 1 (18), but by Order dated December 2, 1944, the Interstate Commerce Commission dismissed the application holding that the Connecting Company was not required to hold such a certificate in order lawfully to reacquire and operate the railroad (R. 66a-75a).

On December 19, 1944, the District Court entered its Order No. 39 (R. 76 (a) ff) which, after reciting that the Court was satisfied (presumably by the decision of the Commission) "that the requirements of the laws relating to the continuous operation of the railroad have been complied with" authorized and empowered the Connecting Company to serve written notice upon the Debtor and Trustee of the termination of the main-stem lease for breach of the covenant against assignment and to terminate the leases of Plots A and B under the tie-in agreement, and to enter the demised premises, including all additional property acquired by the lessee during the lease, and thenceforth to hold, possess and enjoy the same free from any right of the Debtor or Trustee to use the demised premises for any purposes whatsoever. The District Court's order also directed the Trustee to deliver to the Connecting Company "all property of the debtor in the possession or under the control of the Trustee and presently held or used for railroad purposes, whether real, personal or mixed", excepting money, cash, accounts receivable, choses in action

or other intangible claims "notwithstanding conflicting claims thereto" (R. 77a).

The Circuit Court of Appeals, in an opinion filed July 17, 1945, affirmed this order. It did so, however, not upon the ground that the qualification of the Trustee was a breach of the covenant against transfer, but upon the ground "that the lease was breached when it was adopted by the Trustee" (which adoption was made only pursuant to the order and direction of the District Court). Notwithstanding that no plan for the reorganization had yet been presented which would indicate the disposition to be made of its property, the Circuit Court of Appeals upheld the direction of the District Court that the Trustee turn over to the Connecting Company all the property of the Debtor, including two small parcels owned in fee and property concerning which there were conflicting claims, on the ground that this would permit "the operation of this small trackage as a part of the main stem of the railroad and in addition provides means whereby the contested claims may be disposed of promptly".

It is this decision of the Circuit Court of Appeals, affirming Order No. 39 of the District Court, of which your petitioners seek a review.

## Jurisdictional Statement

The jurisdiction of this Court is invoked under United States Code, Title 28, Section 347 (Judicial Code, Section 240 (a) as amended). The decision of the Circuit Court of Appeals, of which review is sought, was entered July 17, 1945.

## Questions Presented

1. Did the qualification of the Trustee, appointed by the Court in a proceeding for the reorganization of Debtor railroad under Section 77 of the Bankruptcy Act or the subsequent adoption of the main stem lease by the Trustee,

pursuant to the order of the Court, for the purpose of fulfilling the Debtor's obligations thereunder, including the payment of rent, and of conserving the lease and the railroad's property in order to make possible the preparation, submission and carrying out of a plan of reorganization in which the Debtor might continue the lease, constitute a breach by the Debtor lessee of the covenant in the lease against unauthorized transfer?

2. In the proceeding under Section 77 of the Bankruptcy Act, did the qualification of the Trustee or the adoption of the main stem lease by the Trustee, pursuant to the order of the District Court, entitle the Connecting Company, landlord, to terminate the lease and have the property returned to it for breach of the covenant against transfer, thereby frustrating the reorganization of the Debtor as a railroad, for the purpose of which the proceeding was instituted?

3. If the qualification of the Trustee or the adoption of the lease by the Trustee constituted a breach of the covenant in the lease against transfer, was the covenant contrary to public policy and unenforceable?

4. Did the District Court err in holding that the qualification of the Trustee in the proceeding under Section 77 for the reorganization of Debtor railroad, or the adoption of the lease by the Trustee, entitled the landlord to terminate the lease for breach of the covenant against unauthorized transfer?

5. Did the Circuit Court of Appeals err in holding that the adoption of the lease by the Trustee, pursuant to the order of the Court in the proceeding for the reorganization of Debtor railroad under Section 77 entitled the landlord to terminate the lease for breach of the covenant against unauthorized transfer?

6. Prior to the submission and consideration of a plan of reorganization under Section 77 of the Bankruptcy Act, was the termination of the main stem lease premature?

7. Did the District Court err in ordering the Trustee to deliver to the Connecting Company not only the property covered by the main stem lease and the tie-in agreement, but also all other property of the Debtor held by the Trustee, except money and intangibles, including property owned in fee by the Debtor and property as to which there were conflicting claims, in order that the Connecting Company might operate these properties as a railroad?

8. Even if the Connecting Company was entitled to terminate the main stem lease and take back the properties covered thereby and by the tie-in agreement, did the District Court, in advance of a plan or reorganization, have discretion to direct the delivery to the Connecting Company of other property owned by the Debtor?

9. Did the District Court err in accepting the decision of the Interstate Commerce Commission that the Connecting Company, landlord, was not required to secure a certificate of convenience and necessity under Section 1 (18) of the Interstate Commerce Act in order lawfully to reacquire and operate the leased premises as a railroad in interstate commerce as conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with?

10. Did the District Court err in permitting the Trustee to surrender the lease and discontinue the operation of the railroad without prior approval by the Interstate Commerce Commission authorizing such discontinuance of operations?

**Reasons Relied On for the Allowance of the Writ**

The questions presented are of great concern to petitioners, for if the order of the District Court was proper, terminating the leases and turning all of the Debtor's property over to the Connecting Company, the reorganization of the Debtor as a railroad is completely frustrated, the Debtor ceases to be an operating railroad and the creditors of the Debtor lose all access not only to the leased properties but to other properties owned by the Debtor.

It is believed that these questions are also of great general importance in connection with the administration of Section 77 of the Bankruptcy Act and the reorganization of railroads thereunder. It is well known that a large part of the railroad mileage of the country is held by the operating companies under long-term leases. At the time, years ago, when such leases were executed, covenants against assignment in general terms were usual. The entire theory of reorganization, to carry out which Section 77 of the Bankruptcy Act was adopted, has been developed since such leases, including that here involved, were executed. Although covenants against transfer, such as that in the present lease, may contain references to transfers accomplished by court order, their obvious intention was to protect landlords from having strangers substituted without their consent for the tenants with whom they contracted. The whole purpose of a reorganization under Section 77, however, is to avoid distribution of a debtor's assets, to keep the railroad properties together for continued operation after reorganization, and to enable the Debtor itself to carry on. *Van Schaick* v. *McCarthy*, 116 F. (2d) 987 (C. C. A. Tenth). It is only if a lease is rejected that the Debtor lessee does not continue the lease, and in that event the property goes back to the landlord by virtue of the rejection.

If such a covenant against transfer as that here gives a landlord of railroad properties the right to terminate a lease, railroad reorganizations will in large part be made difficult, if not sometimes impossible.

It has been said by this Court that "Sec. 77 manifest the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court." *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448. This intention would be defeated because the railroad properties would be dissipated, as here, before any plan could come before the Commission for its consideration.

Under the circumstances the questions involved are of far reaching importance. They include the effect to be given to such covenant against transfer in leases of railroad properties; whether with the enactment of Section 77 covenants which would permit termination of leases under circumstances such as those here became contrary to public policy; whether it is consistent with the provision of Section 77 (Title 11, Section 205) within the meaning of paragraph (1) thereof, that a clause permitting termination of a lease of railroad property shall be enforceable as provided in Section 110 (b). None of these questions has been passed upon by this Court.

Moreover, the order of the District Court rests on the premise that a landlord is not required by Section 1 (18) of the Interstate Commerce Act to obtain a certificate of convenience and necessity from the Commission in order lawfully to operate railroad property recovered by termination of a lease, although it has not itself operated as a railroad since Section 1 (18) was enacted. It is submitted that this premise is erroneous, and that the question presented is one of broad concern in connection with leases of railroad properties and their reorganization.

It is believed that these questions and other issues involved herein are of such moment that this Court should grant certiorari to review the decision of the Court below.

WHEREFORE, your petitioners respectfully pray that Writ of Certiorari issue to the United States Circuit Court of Appeals for the Third Circuit and submit herewith their brief in support of this petition.

Respectfully submitted,

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*Attorneys for Petitioners, Hoboken Manufacturers Railroad Company, Debtor and Seatrain Lines, Inc., a Creditor.*

Dated: August 30th, 1945.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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## No. 384

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FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR; THE DEBTOR, HOBOKEN MANUFACTURERS RAILROAD COMPANY; AND SEATRAIN LINES, INC., A CREDITOR, *Petitioners,*

*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, AND HOBOKEN LAND AND IMPROVEMENT COMPANY, *Respondents.*

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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### Preliminary Statement

We refer to the foregoing petition for a summary statement of the matter involved and the jurisdictional statement. The opinion of Judge Fake in the District Court is reported in 56 Fed. Supp. 187 and printed in R. 55a. The opinion in the Circuit Court of Appeals is not yet reported but is printed in R. 116.

## Argument

### Point I

**Neither Filing of the Section 77 Reorganization Petition, Nor Qualification of the Trustee, Nor His Adoption of the Leases Pursuant to Direction of the Court, Entitles the Landlord to Terminate the Main Stem Lease on the Ground of Breach by the Debtor of the Covenant Against Assignment.**

This point covers numbers 1 to 5 of "The Questions Presented" in the petition.

Sub-division (d) of Section 77 of the Bankruptcy Act provides that the Debtor, after a petition for reorganization is filed:

> "shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed * * * unless such time is extended by the judge from time to time for cause shown."

Sub-division (b) provides:

> "A plan of reorganization within the meaning of this section * * * may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; * * *."
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> * * * * * * *
>
> "The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan or reorganization approved hereunder, * * *."

By the same sub-division, it is specifically provided that:

> "In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, * * * or shall be rejected by any plan, any person

> injured by such non-adoption or rejection shall * * * be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

and that:

> "The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section."

By sub-division (c) (2), it is provided:

> "Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe."

and that the trustee appointed by the court upon filing bond

> "shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, * * * and, subject to the control of the judge and the jurisdiction of the Commission * * * the power to operate the business of the debtor."

From these provisions of the statute, two points emerge: first, that the Court and the trustee take possession and operate the property, not under the terms of the lease, but pursuant to the statute; and second, that the statute contemplates that a reasonable period is allowed to reject or adopt a lease, but if adopted it may later be rejected under the plan of reorganization.

Probably the principal decision on the question here involved, which squarely supports the foregoing points, is that of Judge Learned Hand for the Circuit Court of Appeals for the Second Circuit in *Palmer* v. *Palmer* (C. C. A. Second, 1939), 104 F. (2d) 161, Cert. denied 308 U. S. 590, cited with approval in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523. *Palmer* v. *Palmer* involved a phase of the New Haven Reorganization. Judge Hand said (page 163):

> "A lease, being property *cum onere*, does not pass *to a trustee in bankruptcy*, unless he adopts it."

He remarked that if the question were to arise for the first time it might be difficult to see

> "by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term, for instance, the payment of any rent, secured by a right of reentry."

But he went on to say, however:

> "Nevertheless, the contrary has been generally held: and the trustee's adoption of the term is said to 'relate back' to the beginning of the proceeding, or at least to adjudication. The reason for this is not clear. It does not follow from Sec. 70 of the Bankruptcy Act, 11 U. S. C. A. Sec. 110, which vests the trustee's title only 'by operation of law'; for title to the term vests, not by operation of law at all, but only by the trustee's adoption. Be that as it may, the trustee need not pay the rent during the probationary period, and the court will hold off the lessor, and force him to be content with the value of the use and occupation meanwhile, though ordinarily it will fix that at the same amount as the rent. This was the result in Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, and in United States Trust Co. v. Wabash Rail-

way, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085; though so many other circumstances were thought relevant that we are not clear as to the precise scope of either ruling. But we have ourselves a number of times declared that the trustee's title 'relates back,' or that he is liable only for use and occupation, and in some instances what we said was necessary to the result. In Re Frazin, supra, 183 F. 28, 32; In re Sherwoods, 2 Cir., 210 F. 754, Ann. Cas. 1916A, 940; Johnson v. Emerson Phonograph Co., 2 Cir., 296 F. 42, 45; Heineman Corp. v. Levy & Co., 2 Cir., 6 F. 2d 970, 975; In re United Cigar Stores Co., 2 Cir., 69 F. 2d 513, 515; Central Manhattan Properties v. D. A. Schulte, 2 Cir., 91 F. 2d 728, 730. Whether justified in principle of not, the doctrine has by now become too well fixed to be uprooted, especially since no change was made when the whole subject was overhauled in the Chandler Act."

The Connecting Company lease does not contain a "bankruptcy" clause expressly providing that in the event of the filing of a petition in bankruptcy or insolvency the lease shall terminate. Nor does it provide for termination if the lessee should seek the benefits of a railroad reorganization act in its own interest and that of the public. The covenant is solely against selling, assigning or transferring. It provides that the landlord's right to terminate the lease,

> "shall also apply to any unauthorized sale or transfer * * * whether made by the lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated, or in any manner altered. * * *"

It is well settled that provisions for forfeiture of leases are to be strictly construed. They must be construed strictly, not only in accordance with their own language

but also in the light of the provisions and purposes of applicable statutes. It has accordingly been held that a covenant not to assign or transfer is not breached by a petition in bankruptcy so as to permit the landlord to assert a forfeiture. Only if the lease specifically and in express terms provides that it shall terminate upon bankruptcy is it held that bankruptcy works a forfeiture.

In re *Prudential Lithograph Co.* (D. S. N. Y.), 265 Fed. 869; aff'd 270 Fed. 469; cert. den. 256 U. S. 692;
In re *Levinson*, 295 Fed. 146 (D. C. W. D. Wash. N. D. 1923);
In re *Gutman*, 197 Fed. 472;
*Gazlay* v. *Williams*, 210 U. S. 41.

In the *Levinson* case, *supra*, the lease provided as follows:

> "It is expressly agreed that if default be made in the payment of rent above reserved or any part thereof, or any of the covenants by the tenant, it shall be lawful for the owners and their lawful representatives at any time thereafter, without notice, to declare said term ended and to re-enter said premises with or without process of law * * * and * * * repossess and enjoy as before this lease."

In respect to the right of the lessor to repossess the property on the theory that there was an assignment because the lessee became bankrupt, the Court said:

> "There is no express penalty fixed by the terms of the lease against assignment thereof, the provision being in the nature of a covenant, and not a conditional limitation of the estate, which would end by determination of the grant, whereas the covenant requires reentry to terminate the estate. Hague v. Ahrens, 53 Fed. 58, 3 C. C. A. 426. No words of agreement will create a condition. To produce this effect apt terms must be employed. Den v. Post, 25 N. J. Law, 285.

No apt words being used for reentry because of assignment, the phrase 'any of the covenants by the tenant,' under the rule ejusdem generis, would refer to *default in the payment of rent*, and since covenants against assignment of a lease are not favored (270 Fed. 469, supra), but construed with great jealousy (Riggs v. Purcell, et al., 66 N. Y. 193), and the provisions for the forfeiture of a lease being always construed strictly as against the lessor to prevent, rather than aid forfeiture (Camp v. Scott, 47 Conn. 366-375), there appears to be no legal inhibition against this assignment."

In *Gazlay* v. *Williams*, 210 U. S. 41, the facts were as follows:

Under a written agreement, "G" leased to "K" for a period of years certain premises. The lease contained a provision to the effect that if "K," the lessee, should assign the lease or underlet the premises or if lessee's interest should be sold under execution of other legal process without the written consent of lessor, or if lessee should fail to keep any of the other covenants of the lease, lessor should have the right to re-enter the premises and repossess them and thereupon the lease would become void and terminate. During the existence of the lease the lessor "G" filed a petition in an Ohio court against "K" for recovery of rent due under the lease and also asked that the receiver be appointed to take charge of all the property of "K," including the leasehold estate, and that the unexpired term of the lease be sold subject to all the terms and conditions contained in the lease. Thereafter, with the consent of the lessor, the leasehold was purchased by "B." "G" did not give its written consent to the sale of the leasehold to "B" but nevertheless acquiesced in it, and the Court said that the resulting agreement between "B" and "G" could be considered as if "B" were the original lessee (p. 48).

Thereafter, "B" was adjudged a bankrupt and "W" was appointed trustee of his property, including the leasehold estate. Thereafter "W" filed an application for the sale of the leasehold, making the lessor a party thereto and asking that they be required to set up any claim that they might have. It was apparently the purpose of the trustee in filing the foregoing application to have the Court determine whether the covenants described and the lessor's right of re-entry would constitute a cloud upon the leasehold in the event it was sold by him.

The Court held that the transfer of the property to "W," the trustee, was effected by operation of law and did not constitute a breach of the covenant of the lease giving the lessor a right of re-entry. The Court further held that the sale by "W" for the benefit of Brown's creditors was not forbidden by the condition of the lease and would not be a breach thereof because it would not be a voluntary assignment by the lessee nor a sale of the lessee's interest but of the trustee's interest arising under the bankruptcy proceedings.

In *In re Prudential Lithograph Co., supra*, the lease under consideration contained covenants similar to those contained in our Debtor's lease. It provided that the lease should not be assigned nor the premises underlet without the written consent of the lessor endorsed thereon and also contained provisions that "in case the rent was behind and unpaid or in case of the violation of any of the covenants, conditions or agreements contained therein, the lease, at the option of the lessor, should become null and void." The lessee having become a bankrupt, the lessor elected to terminate the lease on the ground that an assignment had been made by operation of law. The Court held (p. 473):

> "a covenant against an assignment of a lease can be so drawn as to provide for a forfeiture by an assign-

ment by operation of law but there is no such express provision in the lease before the court and in its absence a court will not infer one."

Applying the principle of these cases, we submit that only if it were expressly provided in a lease of a railroad that it should be forfeited if proceedings for reorganization should be instituted under Section 77 could it be argued that in such an event the landlord would be entitled to terminate the lease. Even if a lease contains such a provision in express terms, we submit that it should be held unenforceable as against public policy. There is no provision in the lease involved here which can be said to constitute an express provision for termination in the present circumstances.

Looking at the covenant in the lease, Article Third, paragraph (1), it is plain that neither the inauguration of the reorganization proceedings, the qualification of the Trustee nor the adoption of the lease, subject to its rejection in the plan of reorganization, by the Trustee violated the first part of the paragraph, whereby it was provided that:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises. * * *"

So far this is a typical covenant against assignment and the cases previously cited are conclusive that such a clause does not afford a right to terminate upon bankruptcy, much less because of what is done in a reorganization proceeding.

The Landlord's claim rests, therefore, on the last sentence of the paragraph, that

> "This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, * * * whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may

be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor * * *."

In the first place, what is meant by an "unauthorized" transfer? Certainly the procedure provided by statute to enable a railroad to continue in operation in the service of the public cannot be regarded as "unauthorized."

Obviously, the adoption of the lease by the Trustee is neither a "sale" nor an "underletting" of the demised premises. If it is described at all by the language of the lease, it is as a "transfer." But not all transfers are barred by the covenant: It is only a transfer by which "The rights, duties, and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered" which are within the prohibition of the covenant. This makes it necessary to consider what really takes place when a lease of a railroad is adopted by a Trustee in a reorganization proceeding.

A trustee in an ordinary bankruptcy proceeding takes the debtor's property for the purpose of liquidating it for the benefit of creditors. The expectation is that the assets will be sold and the bankrupt's title to and interest therein will be extinguished. This is plainly what was contemplated by the language of the lease involved here. In the reorganization of a railroad under Section 77, however, although the statute in Subsection (c)(2) says that "The trustee * * * shall have all the title * * * of a trustee appointed pursuant to section 72," this is subject to the proviso that he may exercise his powers only "subject to the control of the judge and consistently with the provisions of this section." And even the authority of the judge is limited. The trustee may not sell the leasehold or any other asset, nor may the judge direct him to do so.

The property may ultimately be disposed of only in accordance with a plan of reorganization approved by the Interstate Commerce Commission and then confirmed by the court. The only exception to this is the right of a trustee to reject executory contracts. The trustee holds the debtor's property, not for the sake of disposing of it, but for the purpose of keeping it intact as a going railroad and of returning it to the debtor when a plan for reorganizing the debtor's obligations and capital structure has been worked out. In other words, upon adoption of the lease and until a plan of reorganization becomes effective the trustee really holds the property for the debtor; he pays the debtor's obligations under the lease from the debtor's funds and, in effect, for the debtor's account. And unless the plan of reorganization provides for the rejection, as provided for under subsection (b) of Section 77, or modification of the lease, the debtor or lessee resumes all of its rights and obligations thereunder for itself.

In short, we submit that what transpires when a trustee in a railroad reorganization adopts a lease is not a transfer of the sort described by the covenant involved here, in that it does not permanently transfer nor does it of itself encumber, abrogate or alter the rights, duties and obligations of the lessee. It preserves them.

If a corporation worked out a reorganization of its capital structure by agreement among its security holders and continued to carry out the terms of any lease or executory contract which it might have, it could not be claimed that there was a transfer or assignment of a lease which would constitute a breach of a covenant against assignment. The tenancy would be uninterrupted. This is exactly the result here if a lease is adopted. The reorganization is carried on under the supervision of the court and the Interstate Commerce Commission instead of by voluntary

agreement among the security holders and creditors, but it is nevertheless a reorganization and not a liquidation or distribution and transfer of assets. The Trustee's function is to preserve the debtor's estate during the accomplishment of reorganization and carry out all of the terms of the lease on behalf of the debtor. When the plan of reorganization is worked out and the reorganization completed, if the plan provides for the adoption of the lease by the debtor there will, in effect, have been no interruption whatever in the debtor's occupancy of the premises and performance of the terms of the lease. It is only if the lease should ultimately be rejected that there would be any transfer of the lease or leased premises from the lessee-debtor and this would be a transfer to the landlord. Hence, it follows that with the adoption of the lease by the Trustee, pursuant to the order of the court, it becomes premature to assert that there has been a breach of the lease entitling the landlord to re-enter, and whether such a contention may ultimately be made can only be determined after a plan of reorganization has been submitted.

It may be observed, moreover, that a contrary conclusion would produce the anomalous result that the lower court, by its own act in directing the trustee to adopt the lease, would be the cause of a termination of the lease by the landlord, which would defeat the very adoption by the Trustee which the Court directed. If this were the law the lower court should not have directed the adoption of the lease but should, as he had the right to do, have allowed the matter of rejection or adoption to await the submission of a plan of reorganization, in which event, in accordance with the authorities cited under Point I, all rights of the landlord under the lease would have been held in suspense.

Moreover, we submit that it cannot be said that the adoption of the lease by the Trustee was "without the consent of the Lessor." This contention is not available to

the landlord because the statute itself provides the consent. Any other view would mean that a landlord could prevent the reorganization of a railroad and cause its dismemberment by refusing consent to a reorganization provided for by statute. Here, again, it is essential to appreciate the difference between the adoption of a lease by a trustee in the reorganization of a railroad and the taking over by a trustee in bankruptcy of the assets of a bankrupt for the purpose of sale. It is not inconsistent with public policy for a lessor to object to the sale of a leasehold to a total stranger. It would defeat the reorganization machinery provided by the Congress to keep railroads functioning if a lessor could be heard to assert a refusal to allow a trustee to adopt a lease for the purpose of preserving the property and operating it until a plan of reorganization is worked out and then of returning it to the debtor, or of rejecting it so that it will revert to the landlord. And a landlord leasing a railroad, even in 1906, had notice of the public interest in such property. The "Act to Regulate Commerce" was approved February 4, 1887, and after many amendments became the "Interstate Commerce Act" in 1920.

The Circuit Court adverted to the recent decision of this Court in *Finn* v. *Meighan*, 65 S. Ct. U. S. 1147, but recognized that the pertinent provision of the lease there being construed specified the filing of a "petition in bankruptcy." Furthermore, Section 77 of the Bankruptcy Act is independent of and differs radically in purpose from the part of the statute relating to ordinary bankruptcy proceedings and from Chapter X relating to corporate reorganizations. *Finn* v. *Meighan*, *supra*, makes it clear that Section 70 relating to ordinary bankruptcy and providing as to leases that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto shall terminate the lease or give the other party an

election to terminate the same shall be enforceable" applies also to Chapter X reorganizations by virtue of Section 102 of that chapter specifically incorporating Chapter VII, which includes Section 70 therein. There is no similar provision specifically incorporating Section 70 of the Bankruptcy Act in Section 77 relating to railroad reorganizations.

Petitioners submit, therefore, that qualification of the Trustee under Section 77—he then taking the leasehold estates "*cum onere*"—and his subsequent limited adoption of the leases, subject to the statutory right to reject them in the plan of reorganization, did not breach the covenant against assignment in the Connecting Company lease, a strict construction of such forfeiture clause aided by public interest and policy as expressed in Section 77 favoring the Debtor and its reorganization.

## Point II

### The Purpose of Section 77 of the Bankruptcy Act is Reorganization of Railroads, Not Liquidation, so Termination of the Main Stem Lease, if Legal, Before Consideration of Any Reorganization Plan Is Premature.

In considering the primary question of the Connecting Company's right to terminate its lease, sight must not be lost of the nature of a reorganization proceeding under Section 77 of the Bankruptcy Act. In ordinary bankruptcy a trustee takes the bankrupt's property for the purpose of liquidating it in order that the assets may be realized upon for the benefit of the various creditors. The purpose of Section 77, however, is just the opposite. It is to keep the assets together, continue the corporation as a going railroad and rearrange its indebtedness, while so doing, in such a way as to enable the railroad to continue to function. Only such assets as constitute a drain upon the railroad, and

therefore defeat the purpose of continuing it in operation, are to be disposed of.

Thus, in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, this Court said (p. 468):

> "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, Sec. 77 manifests this intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.
>
> "It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many-sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of reorganization, fair to the public, creditors and stockholders. The resulting legislation was an attempted balance between the power of the Commission and that of the court."

In *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, this Court held that the Bankruptcy Court acting under the provisions of Section 77, although it could not impair, could nevertheless delay by injunction the enforcement of a contract which empowered the Continental Bank and other

lenders to sell collateral pledged as security for loans made to the debtor, on failure to pay interest, insolvency of the debtor or the appointment of a receiver for its properities. At pages 676 and 677 this Court said:

> "The injunction does not infringe Sec. 67 (d), U. S. C. Title 11, Sec. 107 (d). The substance of that provision is that bona fide liens shall not be affected by anything contained in the Bankruptcy Act. The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton* v. *New*, 283 U. S. 318, 321, and cases cited. A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised. So far as constitutional power is concerned, there is no difference between an injunction restraining the enforcement of a real-estate mortgage and one restraining the enforcement of a pledge by the sale of collateral security. Such differences as exist affect not the power but the propriety of its exercise—that is to say, the discretion of the court. Such an injunction, as just indicated, is within the contemplation of Sec. 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section. Compare *Straton* v. *New*, *supra*. Nor does Sec. 57 (h), 11 U. S. C. Sec. 93 (h), also invoked by petitioners, have any pertinent application to the question under discussion in the light of the provisions, purpose and aid of Sec. 77."

See also *United States Trust Co. v. Wabash Ruy. Co.*, 150 U. S. 287, 299, 300.

In an illuminating article discussing at length various problems in connection with railroad reorganization under Section 77, *Railroad Leases and Reorganization*, 49 Yale Law Journal 1401, Professor Mack, citing the foregoing and other decisions, concludes (p. 1413) that for a trial period which

> "in modern reorganizations will and should be somewhat longer than that accorded under old equity practice" (p. 1414)

during which a trustee may determine whether to adopt or reject a lease,

> "The court may prevent the Lessor from retaking its properties for this period without payment of any rent whatever" (p. 1413).

In *Van Sciaick v. McCarthy*, 116 F. (2d) 987 (C. C. A. Tenth), Circuit Judge Phillips, speaking for the Court, stressed the point that the purpose of a reorganization under Section 77 was to keep the debtor corporation going and not divorce it from its property or its property from it. At pages 992 and 993, he said:

> "Sec. 77 has for its main purpose the rehabilitation of the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof. During the process of reorganization it contemplates the continued corporate existence of the debtor under the control and supervision of the court.
>
> "It may be doubted that, in view of the objects and purposes of Sec. 77 and the means provided for their

accomplishment, a secured creditor is entitled during the pendency of the proceeding to have income sequestered and subjected to the lien of his mortgage. Sec. 77 does not contemplate sale and liquidation or the application of earnings to the payment of mortgage securities. On the contrary, it provides for a fair and equitable plan of reorganization and a just allocation of the securities of the reorganized company, taking into consideration not only the principal but the unpaid interest on mortgage obligations. But we prefer not to rest our decision on this narrow ground.

"Sec. 77 provides for the submission of the plan to the Interstate Commerce Commission, for a public hearing before the Commission, for a certification of the plan to the court, and for a hearing before the court. It further provides that if the judge does not approve the plan, he may refer it back to the Commission for further action. It is manifest that a considerable period of time must necessarily elapse before a satisfactory and proper plan can be worked out and receive the requisite approval. During that period the railroad company must be operated by the trustees under the supervision and control of the court in the public interest and for the protection of the private interests involved, and to that end such expenditures must be made as are reasonably necessary to preserve and protect those interests and maintain the integrity of the railroad, so that it may be turned over to the reorganized company as a going concern. Sec. 77 contemplates that the reorganized road shall be a living, not a dying, railroad enterprise. To permit the competitive position of the road to be lost during the period of reorganization would greatly endanger the future earnings upon which the plan is to be largely based and out of which the reduced fixed charges are to be paid."

And in *In re Central of Georgia Ry. Co.*, 48 F. Supp. 445 (D. C., S. D. Georgia), aff'd in 135 F. (2d) 52 (C. C. A. Fifth), the Court emphasized that the purpose of Section

77 was to keep the railroad properties together until a plan of reorganization could be worked out. It said (p. 449):

> "To permit the steamship line to be divorced from the railway at this time is tantamount to a dismemberment of the system. If I properly understand the philosophy of section 77 of the Bankruptcy Act as amended, 11 U. S. C. A. Sec. 205, under which these proceedings were taken, among other things, it was to prevent the disintegration of a railway by parceling out the mortgaged property in divisions or according to prior liens, and to preserve it as a unit of the national transportation system until reasonable opportunity has been furnished to develop and submit a plan of reorganization which will be fair and equitable to all of the interests concerned. If at the very time the trustee, his advisory committee, and the several bondholders' committees are attempting to develop such a plan they are met with the threat that the steamship company, regarded by many of them as an integral part of the system, is to be withdrawn and liquidated or operated independently of the railway, they will be denied what I consider a reasonable opportunity through negotiation to reorganize the system as a whole."

It is clear from the foregoing language of this Court in the *Western Pacific* case that nothing should be done by the Bankruptcy Court which will prevent the consideration by the Interstate Commerce Commission of a plan of reorganization.

Under these circumstances, we submit that while a trustee appointed by the Court under Section 77 takes title to a debtor's assets, he may not, like a trustee in bankruptcy, sell the assets which constitute the railroad's property, and without which it may not operate, nor may he be directed by the Court to do so. These assets, such as the lease of the railroad's right of way, to the extent that they are essential to the reorganization of the railroad, he must

hold for the purposes of a plan of reorganization. Even if he elects not to hold a lease, he may not sell it; he may only reject it.

With a large part of the railroad mileage of the country operated under lease, and with a covenant against assignment being common in leases, the Congress in enacting Section 77 could not have contemplated or intended that the machinery thereby set up to keep the railroad property together pending reorganization, namely, the appointment and qualification of a trustee and his adoption of leases subject to their rejection in the plan of reorganization, would or should be used to automatically defeat the entire purpose of reorganization by enabling landlords to retake different sections of railroad property and thereby effectively frustrate a reorganization.

The foregoing considerations also bear directly upon the interpretation and effect of the lease.

We submit, therefore, that even admitting for argument's sake that the District Court was correct in holding the Connecting Company had a legal right to terminate its lease, entry of the termination order before considering any reorganization plan was premature.

## Point III

**Order No. 39 Should Be Reversed Also Because It Transfers Possession of Certain Railroad Property, Claimed by the Trustee, to the Landlord Before Determination of Title Rights Thereto.**

The Order under review provides in part that:

> "3. Notwithstanding conflicting claims thereto, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, cash on hand, accounts receiv-

able, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise." (77a).

The property of the Debtor to which the Trustee asserts a claim, even though it is now used for railroad purposes and so under the forfeiture clause of the Connecting Company lease (Sub-paragraph (b), 87a), might revert to that landlord on termination of its lease, includes land and tracks leading to the float bridge and a short portion at the end of the right of way with tracks and two sidings. The Trustee and Debtor maintain that by an Indenture dated June 29, 1927, the Connecting Company released these properties to the Debtor (71a).

Paragraph 3 of the Order was included therein, as was Paragraph 4 (77a) relating to records of the Debtor required for the continued and uninterrupted operation of the railroad, so that there would be no cessation of operations during wartime. However, we submit that possession of the entire railroad property should have been left in the Trustee, and so under control of the Court, at least until determination of title to the property in dispute. The landlords would not be harmed thereby, for, aside from a period of time before adoption of the leases when use and occupation was fixed and paid at the rental rates provided therein, the Trustee has paid or, he operating at a profit and being able to pay, attempted to pay, all rent reserved by said indentures.

## Point IV

**The District Court Erred In Failing To Require the Landlord To Obtain a Certificate of Convenience and Necessity Under Section 1 (18) of the Interstate Commerce Act As Conclusive Evidence That the Requirements of the Laws Relating To Continuous Operation of the Railroad Had Been Complied With.**

The District Court in its decision granting the Connecting Company's motion to terminate the lease provided that such termination should "take effect upon production to the Court of *conclusive* evidence that the requirements of the laws relating to continuous operations of the railroad have been complied with".

This requirement of the District Court had reference, among other things, to the provisions of Section 1 (18) of the Interstate Commerce Act (U. S. C. A. Title 49), which provides that:

> "After ninety days after this paragraph takes effect *no* carrier by railroad * * * shall acquire or operate any line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the * * * operation * * *."

The Connecting Company, in order to satisfy the Court's requirement, thereafter filed with the Interstate Commerce Commission an application for the issuance to it of a certificate of convenience and necessity under Section 1 (18) authorizing it to resume operations, but accompanied its application with a reservation challenging the Commission's jurisdiction to require it to obtain a certificate. The Commission rendered its decision, in which it held that the Connecting Company, being the owner and lessor of the

line of railroad in question, was under no obligation as a matter of law to obtain a certificate of convenience and necessity and accordingly, by its Order of December 2, 1944, dismissed the application.

This decision of the Commission cannot be reconciled with the provisions of Section 1 (18) (U. S. C. A. Title 49) or with its previous decisions and those of this Court. The provisions of Section 1 (18) that no carrier by railroad shall operate any line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the operation of such line of railroad is all-inclusive and plainly does not contain any exception that would permit lessors to resume operations without first obtaining a certificate.

Prior to its decision in this matter the Commission had, in a number of cases, held that ownership of a line of railroad, even where the railroad had been in operation in interstate commerce, does not give the owner the right to operate the railroad. Under these decisions it is held that unless the owner was operating the railroad in question when Sec 1 (18) was enacted, it must obtain a certificate before it may lawfully operate it in interstate commerce. *Acquisition of Line By B. & H. S. R. R. Co.*, 90 I. C. C. 448, 453; *Missouri & A. Ry. Co., Acquisition and Stock*, 207 I. C. C. 641, 643; *Chicago G. W. R. Co., Trustees' Acquisition*, 230 I. C. C. 349; *Jefferson & N. W. R. Co. Acquisition and Operation*, 217 I. C. C. 483. This Court has also held that a railroad subject to the Interstate Commerce Act and in operation, desiring to enter into a trackage agreement to operate over the line of another railroad also in operation in interstate commerce, may not do so unless it first obtains a certificate of convenience and necessity under the provisions of Section 1 (18). *Transit Commission* v. *United States*, 289

U. S. 121. These decisions should have been accepted as controlling authorities requiring the Connecting Company to obtain a certificate prior to the resumption of operation of the line of railroad reverting to it upon termination of the lease.

The Commission predicated its ruling to the contrary primarily upon the theory that Debtor, the lessee, in operating the railroad did so as the agent of the lessor and that the latter, having received a charter and franchise from the State of New Jersey, is under an obligation pursuant thereto to operate the railroad.

It is submitted that the Commission's view that the Debtor was acting as the agent of the Connecting Company in the operation of the leased line of railroad cannot be sustained as a matter of law. A ninety-nine year lease represents a complete alienation of the possession and use of the property for the period of the lease; the only difference between a lease and a sale being that in the case of a lease there is a limit to the time during which the lessee may enjoy the benefits and obligations of possession. *Tiffany, Law of Real Property*, 3rd Edition, Sections 25, 76, 79 and 99. So long as the Debtor fulfilled the terms of the lease its possession and enjoyment of the leased property were complete and it was using the property for its own purposes and in no way acting as agent or *alter ego* for the Connecting Company.

Regardless of what may have been the relation between the Debtor and the Connecting Company it does not follow, as found by the Commission, that the Connecting Company is not required to obtain a certificate of convenience and necessity on the theory that it is under an obligation to operate the railroad pursuant to a charter and franchise issued to it by the State of New Jersey. The obligations of carriers under charters or franchises issued by states to

engage in interstate transportation may be enforced by the grantors only insofar as such enforcement does not conflict with the policy and laws of the federal government. By enacting the provisions of paragraph 18 of Section 1, Congress provided that whether corporations should be permitted to engage in interstate commerce by railroad is a matter to be determined by the Interstate Commerce Commission to the exclusion of whatever authority the states may previously have had. *Texas &c. R. R.* v. *Northside Belt Ry.*, 276 U. S. 475, 481; *R. R. Comm. of State of Cal.* v. *So. Pac. Co.*, 264 U. S. 331.

Moreover, it is to be borne in mind that if in the situation with which we are presently concerned the State of New Jersey were to refrain from enforcing whatever are the obligations of the Connecting Company to operate under the charter and franchise issued to it, the Connecting Company could under the Commission's theory, by refusing to operate, deprive interstate commerce of the services of the railroad owned by it. Considering that Section 1 (18) prohibits carriers from engaging in interstate operations or discontinuing such operations without first obtaining from the Commission a certificate authorizing them to do so, it is difficult to conceive that Congress intended any such exception to these requirements.

It is respectfully submittted, therefore, that the decision of the Commission in dismissing the application of the Connecting Company, thereby permitting it to engage in interstate operations without first obtaining a certificate of convenience and necessity under Section 1 (18) of the Act, rests upon an erroneous conception of the law.

In view of the obvious inconsistencies between the decision of the Commission rendered on the application of the Connecting Company on the one hand and the provisions of Section 1 (18) and the previous decisions of the Com-

mission and of this Court, the District Court should not have accepted the Commission's decision as *conclusive* evidence that the requirements of the laws relating to the continuous operation of the railroad had been complied with. The District Court should, under the circumstances, either have refused to accept the interpretation of the Commission or directed the Trustee to seek a review of the Commission's Order dismissing the application of the Connecting Company with the view of obtaining a final determination by the courts as to the application of the relevant provisions of Section 1 (18). Only in the light of such final determination could it be said that the Court had before it *conclusive* evidence that the Connecting Company had fulfilled the requirements of the laws as to the continuous operation of the railroad.

## Point V

### The District Court Erred In Permitting The Trustee To Discontinue Operation Without Prior Approval By The Interstate Commerce Commission Authorizing Such Discontinuance.

Section 1 (18) further provides that:

> "* * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The effect of the decision of the District Court permitting the lessor to terminate the lease and to require the lessee to deliver possession of the railroad to the lessor will, if ultimately affirmed, have the effect of compelling the Trustee to discontinue operations notwithstanding that such a result would be contrary to the above-quoted provi-

sions of Section 1 (18) and certain of the provisions of Section 77. Congress, in enacting the latter section, very carefully provided that lines of railroad were not to be abandoned without prior approval by the Commission. Thus Section 77(o) (Title 11 U. S. C. A., Section 2050) provides that trustees may abandon lines or portions of lines of railroads upon petition to the Judge "but only with the approval and authority of the Commission when required by Chapter 1 of Title 49, as amended February 28, 1920."

Section 77(c)(6) provides that where a lease is rejected the lessee, under the circumstances set forth therein, may be required to continue to operate the leased line of railroad on or for the account of the lessor until the abandonment of such line is authorized by the Commission.

Reading the provisions of Sections 1(18) and 77(c)(6) and 77(o) together, it seems clear that it was the intention of Congress to prohibit the abandonment of any line of railroad by the Trustee without the prior approval of the Commission. This view is consistent with the conclusions reached by the Commission in several cases in which it has held that lessees of lines of railroad may not discontinue operations without its prior approval, as required by the provisions of Section 1(18). *Lehigh Valley R. Co. Abandonment of Operation*, 202 I. C. C. 659; *Norfolk S. R. Co., Receivers Abandonment*, 221 I. C. C. 258; *Duluth & I. R. R. Co. Control*, 224 I. C. C. 353.

We respectfully submit, therefore, that the Court should have directed the Trustee to apply to the Commission for authority to abandon the operation of the leased line of railroad prior to requiring him to deliver possession of the railroad to the lessor. In *Palmer* v. *Massachusetts*, 308 U. S. 79, 87, 88, this Court said:

> "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the re-

quirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission. Thus, in § 77(c) and § 77(o) *the power of the district courts to permit abandonment is specifically conditioned on authorization of such abandonments by the Commission.*" (pp. 87, 88.) (Italics ours.)

For the foregoing reasons it is submitted that the failure of the Court to require the Trustee to obtain authorization from the Commission to abandon operation of the leased line of railroad is fatal to the validity of the Court's Order authorizing the lessor to terminate the lease and requiring the Trustee to deliver possession of the property to the lessor.

## Conclusion

For the foregoing reasons we respectfully submit that the Circuit Court of Appeals in affirming the District Court's Order No. 39 has decided important questions of federal law which have not been but should be settled by this Court.

Wherefore, it is respectfully submitted that the writ of certiorari prayed for should be granted.

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Dated: August 30, 1945.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 384

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, *et al.*,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, *et al.*,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF ON BEHALF OF FORREST S. SMITH, TRUSTEE.

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| (c) (6) | 19 |
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# Supreme Court of the United States

OCTOBER TERM 1945

No. 384

FORREST S. SMITH, Trustee of the property of Hoboken Manufacturers Railroad Company, debtor; the debtor Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a creditor,

Petitioners,

*against*

HOBOKEN WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and HOBOKEN LAND AND IMPROVEMENT COMPANY,

Respondents.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

## BRIEF ON BEHALF OF FORREST S. SMITH, TRUSTEE.

### I.

### Opinions Below.

The opinion of the District Court of the United States for the District of New Jersey was filed August 4, 1944 and is reported in 56 F. Supp. 187; also printed (R. 42).

The opinion of the Circuit Court of Appeals for the Third Circuit was filed July 17, 1945 (R. 116); is reported in 150 Fed. (2d) 921.

## II.

### Jurisdiction.

The jurisdiction of this court is invoked under USC Tit. 28, Sec. 347 (Judicial Code, Sec. 240(a) as amended).

Cases supporting the jurisdiction of this court on certiorari are:

*Palmer* v. *Commonwealth of Mass.*, 208 U. S. 79;
*Warren* v. *Palmer*, 310 U. S. 132;
*Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448;
*Institutional Investors* v. *Chicago M. St. P. & P.*, 318 U. S. 523.

This Court issued its writ of certiorari October 22, 1945 to review the judgment of the Circuit Court of Appeals for the Third Circuit filed July 17, 1945 (R. 129), which affirmed an order of the District Court for the District of New Jersey dated December 19, 1944 (R. 106) terminating, on petition of the respondents herein (R. 30), a lease dated June 19, 1906, wherein and whereby Hoboken Railroad Warehouse and Steamship Connecting Company leased to the debtor for a period of ninety-nine years the line of railroad of which the petitioner is trustee in reorganization under Section 77 of the Bankruptcy Act. The order terminating the leases was made after the trustee, upon authorization of the court (R. 38), had given the lessor notice adopting and continuing the lease in force (R. 39). Forfeiture of the leasehold was ordered by the District Court because the lease contained a covenant that the lessee would not sell, assign or transfer the lease without the express consent of the lessor, and provided that in the event of the

breach of any covenant in the lease the lessor might sue at law or in equity for breach of the covenant, or by notice in writing terminate the lease and thereupon enter into and upon the demised premises, "free from any right of the lessee, or its assigns, to use the demised premises for any purpose whatever, and thereupon any right, title and interest of the lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made." (R. 32, 33)

The District Court erroneously held that the covenant in the lease was violated by the qualification of the trustee under Section 77 of the Bankruptcy Act, and erroneously held that Section 110b of Title 11, USC, was applicable and operated to terminate the lease upon application of the lessor.

The District Court, at the conclusion of its opinion, said:

> "The motion to terminate the lease granted to take effect upon production to the court of conclusive evidence that the requirements of the lease relating to the continuous operation of the railroad have been complied with" (R. 45).

After this opinion was filed the lessor applied to the Interstate Commerce Commission for authority to repossess and operate the debtor's line of railroad under Section 1 (18) of the Interstate Commerce Act. On December 2, 1944, Division IV of the Commission filed a report holding that since the lessor held a New Jersey charter authorizing it to operate a railroad and had in 1906 executed the lease of the railroad to the debtor, no certificate from the Commission was needed "because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter

for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf" (R. 56).

Accordingly, the petition of the lessor was dismissed by the Commission (R. 57), and the District Court on December 19, 1944 made the order complained of authorizing and empowering the lessor to serve written notice on the debtor and its trustee terminating the lease at midnight on December 31, 1944, and after service of notice to enter upon the demised premises "and thenceforth hold, possess and enjoy the same free from any rights of said debtor or trustee to use the demised premises for any purpose whatever" (R. 59, par. 1).

After notice of appeal was served (R. 62), application was made to the District Court for a stay pending the appeal (R. 73-79), which was denied on terms that the lessor should not sell, lease, mortgage, or otherwise transfer or encumber the railroad property without the approval and order of the court, etc. (R. 89). On application on notice to the Circuit Court of Appeals, a stay was granted pending the appeal (R. 92); and the trustee has been and now is operating the debtor railroad.

The Circuit Court of Appeals in its opinion likewise erroneously held that Section 110b of Title 11 of the United States Code was applicable and permitted the termination of the lease. It held that the covenant of the lease was breached when it was adopted by the trustee, and that the landlord-lessor was entitled to re-enter the premises. The Circuit Court of Appeals also overruled the trustee's contention that the forfeiture of the leasehold estate would prevent a plan of reorganization and defeat the purposes and be contrary to the intent of Section 77 of the Bankruptcy Act because the debtor is a short switching railroad having only nine miles of main stem track, no outstanding

bonds or evidences of indebtedness; having no securities involved, all of debtor's stock being owned by Seatrain Lines, Inc.; and because it alleged that the petition was filed because the debtor desired to procure a lease of the railroad on more favorable terms (R. 94-97).

## III.

## Statement of the Case.

Hoboken Manufacturers Railroad Company (hereinafter referred to as "The Debtor" or "Lessee"), is a New Jersey corporation which operates a switching railroad line along the waterfront of Hoboken, New Jersey, entirely within the State of New Jersey. It is a common carrier engaged almost exclusively in the transportation of freight in interstate and foreign commerce subject to the provisions of the Interstate Commerce Act (United States Code, Tit. 49). Its line of railroad connects on the north with the line of the Erie Railroad, and through this connection and also through a float bridge it interchanges freight with other trunk line railroads serving New York Harbor. As a common carrier by railroad it is subject to the Interstate Commerce Act, and files schedules of rates and files financial reports and accounts with the Interstate Commerce Commission pursuant to that Act (R. 10).

The major part of debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906, for the term of 99 years, from Hoboken Railroad Warehouse and Steamship Connecting Company (hereinafter referred to as "Lessor"). Other smaller parcels are held under leases of approximately the same date and term from Hoboken Land and Improvement Company (R. 10). On July 26, 1943, debtor filed a petition for reorganization

under Section 77 of the Bankruptcy Act (United States Code, Tit. 11, Sec. 205) in the District Court of the United States for the District of New Jersey (R. 10). On the same day said court made its Order No. 1 approving the petition, continuing the debtor in possession of its property, and restraining all persons from taking any action to interfere with such possession or with the continued operation of the railroad (R. 16).

By Order No. 5 entered on October 11, 1943, the court appointed Forrest S. Smith trustee of the debtor (R. 26). The Interstate Commerce Commission approved this appointment by its order of November 4, 1943 (R. 29), and the trustee duly qualified by filing his approved bond and oath on November 12, 1943, and thereupon, by direction of the court, entered into possession of debtor's property (R. 1). Debtor's petition for reorganization stated its assets and liabilities (R. 11, par. 7), and showed that its financial condition was seriously aggravated by several litigations. Litigation between the debtor and its landlord, Hoboken Railroad Warehouse and Steamship Connecting Company was necessary to determine debtor's liability under the lease above mentioned, which required the debtor to pay (1) a stated amount of $22,000 per year; (2) certain amounts per ton of freight transported over the lines of debtor subject to the lease and referred to as "tonnage rents"; (3) all premiums of insurance upon the leased premises, and (4) all taxes upon the demised premises or upon the lessor by reason of its ownership thereof, and of the appurtenant franchises, or upon the rent reserved by the lease which the lessee may be required to pay thereon or retain or deduct therefrom. The petition recites how it was determined that the debtor was liable to pay the lessor as part of the rent the excess profits and capital stock

taxes of the lessor, and also the income taxes levied on all the income the lessor received from the debtor.

Another very serious claim that was asserted against the debtor was that of the Pennsylvania Railroad Company, which claimed compensation for its cars at the rate of $10 per day, or ten times the established per diem rate, on such of its cars as were delivered by debtor to the vessels of Seatrain Lines, Inc. (R. 14 (c)). This claim was resolved in debtor's favor by an order of the Interstate Commerce Commission affirmed by this court in *United States of America* v. *Pennsylvania Railroad Company*, decided January 29, 1945.* It will be noticed that this decision of this court was rendered after the order appealed from had been made terminating debtor's lease.

**Facts Concerning the Lease.**

The major part of debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906 for a term of years from Hoboken Railroad Warehouse and Steamship Connecting Company (hereinafter called "Lessor") (Ex. D-1, R. 63). Two additional pieces of land, known respectively as Plots A and B, are held under 99 year leases likewise dated June 19, 1906 from Hoboken Land and Improvement Company (hereinafter referred to as "Improvement Company"), the parent company of the debtor lessor (R. 71). By a "tie in" indenture dated January 19, 1915, debtor agreed that said leases of Plot A and Plot B should terminate on the expiration or earlier termination of the lessor lease (Ex. D-4, R. 68). Debtor also owned in fee two other parcels of land which were small but vital for the operation of the railroad.

* 89 L. Ed. 428.

Precisely what was leased in the indenture of June 19, 1906 between lessor and debtor is stated in the petition of the lessor to terminate the lease (R. 31). After describing the land on which the line of railroad was constructed, the lease specified:

> "'all rights of way, station and terminal grounds and other lands and interests in lands; all roadbed, trestles, viaducts, super-structures, poles, wires, tracks, rails, ties, freight-houses, water-stations, and tanks, turn-tables, engine-houses, car and machine shops, yards and terminals; all rolling stock and equipment of every description, including locomotives and other engines and cars; all tools, implements and machinery, and all trackage and operating contracts;" etc. (R. 31).

Article Third, paragraph 1 of the lease, contains the provision upon which the courts below decreed a forfeiture of the lease, and it provides as follows:

> "(1) The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 64, 65).

Paragraph 5 of the lease provided:

"FIFTH. It is mutually covenanted as follows:

"If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

"(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the Lessee or to recover damages for the breach thereof; or

"(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, under the terms hereof, may be then due and unpaid for the use of the demised premises" (R. 71).

On February 7, 1944, three months after the approval by the Interstate Commerce Commission of the appointment

of Mr. Smith as trustee, the lessor-Connecting Company served a notice on the trustee, the debtor Seatrain Lines, Inc., and the Pennsylvania Railroad Company that it would present to the court on Monday, February 14, 1944, a petition to modify the injunction contained in Orders No. 1 and No. 5 so as to permit the lessor-Connecting Company to terminate the lease between said company and the debtor dated June 19, 1906 (R. 30). The petition contained the important provisions of the lease, which are above mentioned (R. 31-33). Petitioner alleged that by reason of the premises and by reason of the qualification of the trustee of the debtor's property, and the provisions of Order No. 5 and the provisions of Section 77 of the Bankruptcy Act, the interest of the debtor in the lease and its rights and privileges have been transferred to the trustee in a proceeding to which the lessee is a party, and that the rights, duties and obligations of the lessee have been transferred, encumbered, abrogated and altered without the previous consent of the lessor, contrary to the provisions of Article Third, paragraph 1 of the lease. Petitioner stated that it desired to avail itself of its right to terminate the lease and enter upon the demised premises, and prayed that an order might be made modifying Orders No. 1 and No. 5 to permit petitioner to serve written notice upon the debtor of the termination of the lease and to forthwith enter into and upon the demised premises, and henceforth hold, possess and enjoy the same free from any rights of the trustee or the debtor or its assigns (R. 35). The hearing on this matter was held on February 14, 1944, and decision was reserved (R. 4, Item 2).

The District Court had duly extended the time within which the trustee might elect whether to adopt or reject executory contracts to June 1, 1944 (R. 36, par. 2). On May

23, 1944 the trustee served on the lessor, the debtor Seatrain Lines, Inc., and the Pennsylvania Railroad Company, notice that he would present to the court a petition for an order authorizing the trustee to continue in force executory contracts of the debtor (R. 36-38).

By order dated June 12, 1944 District Judge Fake authorized and directed the trustee to adopt and continue in force any and all leases, trackage, terminal, crossing or operating agreements, or other contracts not fully performed to which the debtor was a party, or under which it may have been obligated as of July 26, 1943, the date on which Order No. 1 approving the petition for reorganization was entered (R. 38), and the trustee immediately served on the lessor and all others having executory contracts notice of their adoption by the trustee (R. 39, 40).

Nearly two months later, and on August 4, 1944, Judge Fake filed his opinion referred to above at page 1, in which he held that the debtor's leasehold interest had been forfeited by qualification of the trustee in reorganization, the termination of the lease to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with (R. 45). On August 29, 1944 Hoboken Land and Improvement Company, lessor of the plots of land used by the railroad for railroad purposes, likewise served a notice on the debtor and the trustee and Seatrain Lines, Inc. that it would present to the court on Tuesday, September 5, 1944, a petition for an order terminating the leases to Plots A and B simultaneously with the entry of an order terminating the lease of the Connecting Company, and directing the trustee to surrender the said premises, Plots A and B, in accordance with the terms of the indenture of January 19, 1915 (R. 46-49).

We have shown on page 3 hereof that the application of the Hoboken Railroad Warehouse and Steamship Connecting Company to the Interstate Commerce Commission for authority to repossess and operate the railroad of the debtor was dismissed by the Commission on December 2, 1944, on the ground that said lessor by operation of law, and without respect to its own desires in the matter, becomes responsible for the operation of railroad properties owned by it upon termination of a lease. We have referred on page 2 hereof to the order of the District Court dated December 19, 1944, which directed the termination of all of the debtor's leases and directed that all the property in the custody of the trustee be surrendered to the lessor on December 31, 1944, at midnight.

Because the country was at war and every facility of the railroad would be needed as an operating unit for the successful prosecution of the war, paragraph 3 of the order terminating the leases (R. 59, par. 3) was inserted at the suggestion of the trustee, so that all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, excepting money in bank, cash on hand, accounts receivable, choses in action, or other intangible claims and the evidence thereof, should be delivered to said Hoboken Railroad Warehouse and Steamship Connecting Company by the trustee. "The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise." This clause could only be justified by the existence of a state of war. The Circuit Court of Appeals recognized that it was a wise

provision, for it permitted the operation of the small trackage involved as a part of the main stem of the railroad in war time and it provided means whereby the contested claims could be disposed of promptly (R. 97).

## IV

## Assignment of Errors.

(1) The courts below erred in holding that the qualification of the trustee in reorganization by the debtor under Section 77 of the Bankruptcy Act and the adoption of executory leases by the trustee constituted a breach of the covenants of the leases whereby the rights, duties and obligations of the lessee were transferred, abrogated and altered.

(2) The courts below erred in holding that because the debtor railroad had filed a petition for reorganization under Section 77, and a trustee had been appointed and qualified, which trustee pursuant to an order of the court had adopted the executory leases; therefore all the rights in the leased premises were forfeit upon application of the lessor, even though such forfeiture would operate to defeat completely a reorganization under Section 77 of the Bankruptcy Act.

(3) The courts below erred in not holding that the forfeiture clause in the railroad leases executed in 1906 were void or unenforceable as being in conflict with the public policy expressed in the Railroad Reorganization Act (Sec. 77 of the Bankruptcy Act).

(4) The courts below erred in directing the trustee of the railroad in reorganization to surrender the railroad properties specified in the leases to the lessor without prior

approval by the Interstate Commerce Commission authorizing (1) such discontinuance of operations by the trustee and, (2) without requiring a certificate of necessity under Section 1 (18) to be issued to the Connecting Company, landlord.

## POINT I.

### Section 77 declared a new public policy for the preservation of railroads in financial difficulties.

At least since 1898 the Bankruptcy Act has never permitted a voluntary or involuntary petition in bankruptcy to be filed by or against a railroad company.*

The Bankruptcy Act has consistently treated railroads, together with building and loan associations, municipalities, insurance and banking corporations, in which the public has an interest above and beyond that of mere debtor and creditor, as constituting a class excepted from corporations and persons who may petition to be declared bankrupts or against whom an involuntary petition in bankruptcy may be filed.

In the depths of the depression, Congress enacted Section 77 of the Bankruptcy Act (Act of March 3, 1933, 47 Stat. 1474, U. S. C. Title 11, Section 205), which was amended slightly by the Act of June 7, 1934 (48 Stat. 911), and further revised by the Act of August 27, 1935 (49 Stat. 911), which merely simplified, clarified and rearranged the Act of 1933.

In 1933 when Section 77 was first passed, a large percentage of the railroads of the country were in desperate

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* See Act of July 1, 1898, Section 4, U. S. Code Title 11, Chap. 3, Section 22, and as last amended June 22, 1938, Chap. 575, Section 1 (52 Stat., 845).

financial condition. It is unnecessary to go into a detailed history of the Section because such history was completely reviewed in the decision of this Court in *Ecker* vs. *Western Pacific R. Corp.*, 318 U. S. 448. Suffice it to say, that prior to the enactment of Section 77, insolvent railroads might be thrown into equity receivership, either in State or Federal Courts, with necessary ancillary proceedings in every State in which the railroad had property, with accompanying administrative difficulty due to different courts asserting jurisdiction over parts of a unified system, excessive costs, inordinate delays, and harassing litigation of all kinds.

The need for railroad rehabilitation legislation under the bankruptcy clause of the Constitution was generally recognized and Section 77 "manifest[s] the intention of Congress to place reorganization under the leadership of the Commission" (I. C. C.), "subject to a degree of participation by the court" (*Ecker* vs. *Western Pacific R. Corp.*, *supra*, at p. 468).

The constitutionality of Section 77 has been determined by this Court in *Continental Illinois National Bank & Trust Co. of Chicago* vs. *Chicago Rock Island & Pacific R. Co.*, 294 U. S. 648.

It is to be observed that a proceeding for the reorganization of a railroad under Section 77 is totally different from an ordinary bankruptcy proceeding, whose principal objective is liquidation of assets and the distribution of the avails among its creditors.

It is further to be observed that the provisions of Chapter X of the Bankruptcy Act, which relate to reorganization of corporations generally, differ materially from the provisions of Section 77 of the Bankruptcy Act. Under

the provisions of Chapter X when there is a failure of acceptance of a plan, failure of consummation of a plan, or failure of proposal of a plan, the court may direct that bankruptcy be proceeded with (Section 236 of Chapter X, U. S. C. Title 11, Section 636) resulting, of course, in the eventual liquidation of the assets of the corporation which has been under reorganization. No similar provisions exist in Section 77.

The reorganization provided by Section 77 is accomplished through a plan which as Mr. Justice Sutherland said:

> "* * * cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874. It is not necessary to the validity of either that the proceeding should result in an adjudication of bankruptcy. The constitutionality of the old provision for a composition is not open to doubt. Re Reiman (D. C.) 7 Ben. 455, Fed. Case No. 11,673, cited with approval in Hanover National Bank v. Moyses, 186 U. S. 181. That provision was there sustained upon the broad ground that the 'subject of bankruptcies' was nothing less than 'the subject of the relations between the insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.'"*

It is to be noted that there is no provision in Section 77 for an adjudication of bankruptcy or for any procedure of any type leading to the liquidation of the assets of the railroad corporation. On the contrary, only one of two results may follow the filing of a petition for reorganization of a railroad corporation under that section. Either (1) a Plan of Reorganization may be approved and put in operation

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* *Continental Illinois National Bank etc. v. Chicago, Rock Island & Pac. R. Co.*, 294 U. S. at p. 672.

(Section 77(f), or (2) the petition may be dismissed (Section 77(e)), in which event the property is revested in the railroad corporation.

Circuit Judge Phillips said in *Van Schaick v. McCarthy*, 116 Fed. 2nd 987 (10th Cir.) at page 992:

> "Section 77 has for its main purpose the rehabilitation of the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof. During the process of reorganization it contemplates the continued corporate existence of the debtor under the control and supervision of the court."

The complete protection of the public interest in such reorganization as distinguished from the interest of the debtor and its creditors was accomplished by giving to the Interstate Commerce Commission, an administrative agency, large control over matters of business and policy involved in a reorganization. Such a provision had never been contained in a Bankruptcy Act before the enactment of Section 77. As Mr. Justice Frankfurter said in *Palmer v. Massachusetts*, 308 U. S. 79, 87,

> "The judicial process in bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commissioner's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission."

The public interest in a railroad reorganization is emphasized by the statement of Mr. Justice Douglas in *Institutional Investors v. Chicago M. St. P. & P. R. R.*, 318 U. S. 523, 544:

> "The nature of the capital structure, as well as the amount of the capitalization, is a component of 'the public interest.' For the 'preservation of the transportation system and the stability of its credit essential to its preservation depend not alone upon the ability of individual carriers to meet their obligations, but upon the ability of all to attract the investment of funds in their securities.'"

Mr. Justice Douglas also said in the same case at page 555:

> "The end product of this reorganization system is supposed to be a fair plan."

In *Thompson vs. State of Louisiana*, 98 Fed. Rep. 2nd, 108 (C. C. A. 8th Cir.), it was decided that the trustee of a railroad debtor in reorganization proceedings must pay the franchise taxes levied by the State. Circuit Judge Gardner, in his opinion at page 110, said:

> "It must always be borne in mind that Section 77 of the Bankruptcy Act has for its main purpose the rehabilitation of the debtor, and to that extent contemplates the continued corporate existence of the debtor. Forfeiture of franchises or accrual of penalties for nonpayment of the tax would be serious barriers to such rehabilitation, and by order of the appointing court the trustee was required to pay the cost of maintaining the corporate entity, organization and franchise of the debtor."

## POINT II.

**The policy declared by Section 77 is that properties of railroads in financial difficulties shall be held together by the law, the debt structure altered by a plan under the Aegis of the Interstate Commerce Commission and the court, and the reorganized railroad restored to solvent continued existence.**

The provisions of Section 77 (U. S. C. Tit. 11, Section 205) which are of special importance in this case are the following:

> Section 77 (a), (b), (c), (especially (c)(2) and (c)(6)), (d), (e), (f), (g), (j) and (o), (Appendix).

It will be noted that the opinion of the District Court (R. 43), as well as the opinion of the Circuit Court of Appeals (R. 95), refer to Section 110b of U. S. C. Title 11 (Section 70b of the Bankruptcy Act) as included in and a part of Section 77. This section, which contains the provision:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereof or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

is incorporated by reference as a part of Chapter X (Chandler Act), providing for the reorganization of corporations generally.* U. S. C. Title 11, Section 506 (Section

* *Finn* v. *Meighan*, October term 1944, 65 S. Ct. 1147.

102 of the Bankruptcy Act) provides that for the purposes of Chapter X, unless inconsistent with the context,—

> "(3) 'Corporation' shall mean a corporation, as defined in this title, which could be adjudged a bankrupt under this title, and any railroad corporation *excepting a railroad corporation authorized to file a petition under section 205 of this title.*"

There is nothing in U. S. C. Title 11, Sec. 205 (Section 77 of the Bankruptcy Act), which indicates any intention that the forfeiture clause of any lease shall be enforceable under Section 77, except a lease of rolling stock equipment (Sec. 205, Par. (j) Appendix). Under the well recognized rule of statutory construction, the recognition of the right of an owner to rolling stock equipment leased or conditionally sold to take possession of such property in compliance with the provisions of the lease or conditional sales contract is an exclusion of all other lessors to take the benefit of a forfeiture clause.

> *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617. Frankfurter J.

Furthermore, the provisions of Paragraph (a) of Section 77 giving exclusive jurisdiction of the debtor and its property wherever located to the court, and the provision of Paragraph (b) permitting the modification of the rights of creditors secured and unsecured, the retention of all or any part of the property of the debtor, the modification of liens and the curing or the waiver of defaults, and the right of a trustee to operate the business of the debtor (Par. (b) (2)) and to adopt a lease for the purposes of the reorganization, all point to the exclusiveness of Section 77 and to prove that Section 70b (Section 110b of U. S. C. Title 11)

was in no respect incorporated into the provisions of Section 77. Indeed, if the decisions of the courts below are sound, the reorganization of practically every railroad can be defeated by lessors who, for one purpose or another, will insist on the letter of the lease and demand forfeiture. Section 77 by its terms recognizes that a substantial part of railroad properties are held on lease, and such leases generally have terms similar to those involved in this case.

It is respectfully submitted that the policy of Congress, as evidenced by Section 77, is that such of the properties of railroads in financial difficulties as are necessary for their operation shall be held together during the reorganization proceeding and until a plan can be prepared satisfactory to the Interstate Commerce Commission and the court, and the plan can either be adopted or the case be dismissed.

*Continental Illinois National Bank and Trust Co. of Chicago* vs. *Chicago, Rock Island and Pacific R. Co.*, 294 U. S. 648, 671:

> "A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts, as they mature.'"

*Group of Institutional Investors* vs. *Chicago M. St. P. & P.*, 318 U. S. 523.

In *In re Central of Georgia Ry. Co.*, 48 F. Supp. 445, 449 (D. C., S. D. Georgia); aff'd in 135 F. (2d) 592, (C. C. A. Fifth), the Court emphasized that the purpose of Section 77 was to keep the railroad properties together until a plan of reorganization could be worked out.

> "To permit the steamship line to be divorced from the railway at this time is tantamount to a dismemberment of the system. If I properly understand the philosophy of section 77 of the Bankruptcy Act as amended, 11 U. S. C. A. sec. 205, under which these proceedings were taken, among other things, it was to prevent the disintegration of a railway by parceling out the mortgaged property in divisions or according to prior liens, and to preserve it as a unit of the national transportation system until reasonable opportunity has been furnished to develop and submit a plan of reorganization which will be fair and equitable to all of the interests concerned. If at the very time the trustee, his advisory committee, and the several bondholders committees are attempting to develop such a plan they are met with the threat that the steamship company, regarded by many of them as an integral part of the system, is to be withdrawn and liquidated or operated independently of the railway, they will be denied what I consider a reasonable opportunity through negotiation to reorganize the system as a whole."
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> *Van Schaick* vs. *McCarthy*, 116 F. (2d) 987, C. C. A. 10th, 992 and 993.

If the rulings below are correct, what railroad in the future would dare to file a petition for reorganization and risk having its leaseholds forfeited?

## POINT III.

**Neither the filing of debtor's petition for reorganization, nor the adoption of the leases by the trustee, was a breach of the covenant against assignment; and if it were Section 77 prevented forfeiture.**

Article Third, paragraph (1) of the lease provided:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor" (R. 32).

The filing of a petition by the lessee railroad for reorganization was neither a sale nor an assignment nor a transfer of the lease, nor an underletting of the demised premises. It was merely the institution of proceedings for its own rehabilitation to the end that it might be rejuvenated. After the Court had determined that the petition was properly filed, appointment of a trustee was mandatory under Section 77(c)(1) of the Bankruptcy Act.

Article Third continued:

> "This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 32).

It cannot fairly be said that the taking of jurisdiction by the court pursuant to the provisions of Section 77 was an "unauthorized sale or transfer" of the demised premises.

Probably the principal decision on this question is that of Judge Learned Hand for the Circuit Court of Appeals for the Second Circuit in *Palmer* vs. *Palmer* (C. C. A. Second, 1939); 104 Fed. (2d) 161, cert. denied 308 U. S. 590, cited with approval in *Group of Investors* vs. *Milwaukee R. Co.*, 318 U. S. 523. *Palmer* vs. *Palmer* involved a phase of the New Haven Reorganization. Judge Hand said (p. 163):

> "A lease, being property *cum onere*, does not pass to a trustee in bankruptcy, unless he adopts it."

He remarked that if the question were to arise for the first time it might be difficult to see

> "* * * by what power the court could keep a trustee in possession, while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term, for instance, the payment of any rent, secured by a right of re-entry."

But he went on to say, however:

> "Nevertheless, the contrary has been generally held; and the trustee's adoption of the term is said to 'relate back' to the beginning of the proceeding, or at least to adjudication. The reason for this is not clear. It does not follow from Sec. 70 of the Bankruptcy Act, 11 U. S. C. A. Sec. 110, which vests the trustee's title only 'by operation of law'; for title to the term vests, not by operation of law at all, but only by the trustee's adoption. Be that as it may, the trustee need not pay the rent during the

probationary period, and the court will hold off the lessor, and force him to be content with the value of the use and occupation meanwhile, though ordinarily it will fix that at the same amount as the rent. This was the result in Quincy, etc. R. Co. *vs.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, and in United States Trust Co. *vs.* Wabash Railway, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085, through so many other circumstances were thought relevant that we are not clear as to the precise scope of either ruling. But we have ourselves a number of times declared that the trustee's title relates back, or that he is liable only for use and occupation, and in some instances what we said was necessary to the result." In Re Frazin, supra, 183, F. 28, 32; In re Sherwoods, 2 Cir., 210 F. 754, Ann. Cas. 1916A, 940; Johnson *vs.* Emerson Phonograph Co., 2 Cir., 296 F. 42, 45; Heineman Corp. *vs.* Levy & Co., 2 Cir., 6 F. 2d 970, 975; In re United Cigar Stores Co., 2 Cir., 69 F. 2d 513, 515; Central Manhattan Properties *vs.* D. A. Schulte, 2 Cir., 91 F. 2d, 728, 730. Whether justified in principle or not, the doctrine has by now become too well fixed to be uprooted, especially since no change was made when the whole subject was overhauled in the Chandler Act."

It is true that the lessor did not consent by resolution of its board of directors to the filing of the petition, but the authorization for that action was a part of the law of the land and hence was either written into the lease or stated differently, the lease was subject to this provision. This is because the Constitution, Article I, Section 8, Clause 4, gave Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States and because Section 77 was enacted pursuant to this power.

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* *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific R. Co.*, 294 U. S. at p. 673.

An equally powerful reason why this statute was incorporated in the lease or the lease was executed subject to this change by Congress, is that the same article and section of the Constitution gave Congress power to regulate interstate commerce, and both the lessor and lessee in this case were subject to the provisions of the Interstate Commerce Act of 1887.* Indeed, it appears from the report of Division 4 of the Interstate Commerce Commission in this case (R. 50), that the lessor was incorporated September 17, 1895; that it constructed this railroad and operated it from September 7, 1897, until June 19, 1906, when it executed the ninety-nine year lease in question to the debtor (R. 50, 51). During all of this period of time the Interstate Commerce Act was in force and effect, but Section 1, paragraph 18, of that act, which provided that no carrier by railroad subject to this chapter shall acquire or operate any line of railroad, or extension thereof, and "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained" a certificate of present or future public convenience, was not adopted until the Act of February 28, 1920 (Chap. 91, Section 402, 41 Stat. 477). This section operated alike upon lessor and lessee for they were both chartered as common carriers by railroad. The lessor had been operating under the Interstate Commerce Act and the lessee was and still is operating under its provisions.

Furthermore, who can say that the action of the debtor in filing its petition for the appointment of the trustee by the court, or the trustee in adopting the terms of the lease, will result in the "rights, duties and obligations of the

* 24 Stat. 379.

lessee" being "encumbered, abrogated or in any manner altered"?

The adoption of the lease by the trustee was in the interest of the debtor and the public for Section 77 was adopted by Congress in the interest of both. Until a plan of reorganization is approved in the manner specified by the Act, the obligations of the lease have been adopted by the trustee for the benefit of the debtor and the public. If a plan of reorganization is approved, then the leasehold will, by operation of law, be retained by the debtor in precisely its original form and vigor or as amended or changed pursuant to the express provisions of Section 77(f) of the Bankruptcy Act.

The lessor cannot complain of this because it has been expressly held by this court that a proceeding under Section 77 is not an ordinary proceeding in bankruptcy.

> "It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised, and to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." *Continental Illinois National Bank & Trust Co.* vs. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. at pg. 676.

See also *Institutional Investors* vs. *Chicago M. St. P. & P. R. R.*, 318 U. S. 523, 554, and *Warren* vs. *Palmer*, 310 U. S. 132, 138.

Even should it be assumed that the covenant in the lease against assignment was breached by the filing of the petition for reorganization, or by the appointment of the trustee, or by the act of the trustee, with court approval, in adopting the lease, nevertheless, we insist that the forfeiture

clause contained in Article Fifth of the lease must yield to Section 77, for the forfeiture clause violates the public policy expressed in that clause. The forfeiture clause reads:

> "If the Lessee * * * shall, at any time or times hereafter during the continuance of this agreement, * * * fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, * * * by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made" (R. 33).

This lease was made of real and personal property in the State of New Jersey where the law does not favor a forfeiture. The cases are collated in the opinion of Vice Chancellor Church in *Sparks* vs. *Lorentowicz*, 105 N. J. Eq. 18. (1929).

Only if the lease specifically and in express terms provides that it shall terminate upon bankruptcy is it held that bankruptcy works a forfeiture.

> *In re Prudential Lithograph Co.* (D. C. S. D. N. Y.), 265 Fed. 869; aff'd 270 Fed. 469; cert. denied 256 U. S. 692;
> *In re Levinson*, 295 Fed. 146 (D. C. W. D. Wash. N. D. 1923);
> *In re Gutman*, 197 Fed. 472;
> *Gazlay* vs. *Williams*, 210 U. S. 41.

Here the forfeiture clause is contrary to the spirit and intent of Section 77 which was enacted in the public interest for the very purpose of keeping railroads in operation even though they were insolvent and unable to pay their obligations as they matured.

And the fact that the Congress provided that in proceedings under Chapter X of the Act (for the reorganization of corporations generally by reference back to Section 70b (U. S. C. Title 11, Sec. 110b) of the Bankruptcy Act (Sec. 102 of the Bankruptcy Act U. S. C. Title 11 Section 502)) that a forfeiture clause in a lease should be enforced, and yet omitted such a provision for forfeiture in Section 77, relating to railroad reorganizations, is a very strong indication that such a forfeiture clause was intended to be inoperative, if not void, as against public policy in railroad reorganizations.

The Circuit Court of Appeals in the case at bar erred in holding that the lease was breached when it was adopted by the Trustee and that the landlord lessor was entitled to re-enter the premises. It cited as helpful in support of this conclusion the case of *Finn* vs. *Meighan*, 65 S. Ct. 1147. That case arose under Chapter X of the Bankruptcy Act and held that an express covenant of forfeiture in a lease is enforceable against the bankruptcy trustee whether the lessee be an individual bankrupt or a corporate debtor in reorganization *under Chapter X*. Section 70b of the Bankruptcy Act provides for such forfeiture and said section of the Bankruptcy Act, as pointed out above, is incorporated into Chapter X by reference in Section 102 of the Bankruptcy Act (U. S. C. Title 11 Sec. 502). Such incorporation, by reference or otherwise, cannot be found in Section 77 dealing with railroad reorganizations.

## POINT IV.

**The District Court had no power or authority to direct the trustee to surrender the railroad to the lessor in the absence of a necessary approval of the Interstate Commerce Commission (A) to the turnover by the trustee; (B) to the taking by the lessor.**

The opinion of the District Court Judge concluded with a statement:

> "The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with" (R. 45).

The Interstate Commerce Commission dismissed the application of the Hoboken Railroad Warehouse & Steamship Connecting Company for authority to repossess and operate a line of railroad on the theory, which we submit is unsound, that a lessor company, by operation of law, immediately, and without respect to its own desires in the matter, becomes responsible for the operation of railroad properties owned by it upon the termination of a lease therefor (R. 56). The order of the District Judge terminating the leases (R. 58) recited that he was satisfied that the requirements of the laws relating to the continuous operation of the railroad had been complied with and provided that the lessor might take possession of the demised premises mentioned in the lease and all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises at midnight December 31, 1944.

The second paragraph of this order provided that upon the giving of such notice and entry in and upon the premises,

any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had not been made (R. 59).

This order, which was affirmed by the Circuit Court of Appeals, was not an order dismissing the proceeding because it left in the hands of the trustee cash, accounts receivable and choses in action, but it prevented completely, if valid, any possible reorganization of the debtor. We submit that this order was contrary to the provisions of Section 1, paragraph 18, of the Interstate Commerce Act because it failed to have the support of a certificate by the Commission that the present or future public convenience and necessity permit of the abandonment by the trustee, and because it failed to have the support of a certificate from the Commission that the present or future public convenience and necessity require the operation of the railroad by the lessor.

Furthermore, since the judicial process is brigaded with the administrative process under Section 77, both are required to act positively in a matter of this importance.

The Circuit Court of Appeals in its opinion affirming the order of the District Court treated as being without merit the trustee's contention that the order allowing re-entry by the lessor was premature because it preceded consideration of a plan of reorganization. It thought that since the debtor is a short switching railroad located only in New Jersey, with no outstanding bonds, and all of its stock being owned by one corporation, that there was no abuse of the court's discretion in permitting re-entry by the landlord since it appears that the petition was filed by the debtor because it desired to procure a lease on more favorable terms. It is submitted that these matters are immaterial. When the court approved the debtor's petition as being

filed in good faith in compliance with the terms and provisions of Section 77, the debtor, as a matter of law, became entitled to the relief provided by that section. The debtor's troubles when the petition was filed were very real. They involved troubles far beyond the provisions of the lease, burdensome though some of those provisions were at that time. The debtor's position has been remarkably improved since the petition was filed for at the time the stay was applied for the operations, after the accrual of all charges and expenses, were showing a profit of between four and five thousand dollars per month under the management of the trustee (R. 99). Since that time, this court decided *United States* vs. *Pennsylvania Railroad Company** and the charge of $10.00 per day that had been claimed for the detention of cars was reduced to $1.00 per day. This is not the time or place to argue the provisions of a plan of reorganization. Under the statute the debtor had a right to attempt to reorganize and the trustee or creditors had a right to submit a plan of reorganization, but the action of the court below in terminating the leases stripped the debtor of practically all of its property, and if the orders are valid the reorganization of the debtor can never be accomplished.

It is respectfully submitted that the judgment of the Circuit Court of Appeals and the order of the District Court should be reversed and set aside.

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* U. S. , 89 L. Ed., 428, 434.

Respectfully submitted,

JAMES D. CARPENTER,
Counsel for Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor

# APPENDIX.

Section 77 of the Bankruptcy Act (U. S. C. title 11, Section 205) is as follows:

REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE—PETITION FOR REORGANIZATION BY RAILROAD, SUBSIDIARY OF CREDITORS; VENUE; PROCEEDINGS THEREON; JURISDICTION OF COURT OVER DEBTOR AND PROPERTY

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided*, That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this title. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this

section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; and upon the filing of such petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon such court, if it approves such petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to such other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of such corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if such corporation has not filed a petition under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and that such creditors

have claims aggregating not less than 5 per centum of all such indebtedness of such corporation and propose that it shall effect a reorganization; copies of such petition shall be filed at the same time with the Commission and served upon such corporation. Such corporation shall, within ten days after such service, answer such petition. If such answer shall admit the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If such answer shall deny either the jurisdiction of the court or any material allegation of the petition the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury and if he shall find that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise he shall dismiss the petition. If any such petition shall be so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. In case any petition shall be dismissed, neither the petition nor the answer of a debtor shall constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence without the debtor's consent, in any proceedings then or thereafter pending or commenced under this title or in any State or Federal court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors shall, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

PLAN OF REORGANIZATION, CONTENTS; "SECURITIES", "STOCKHOLDERS", "CREDITORS", "CLAIMS" DEFINED; SUSPENSION OF STATUTES OF LIMITATION

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the

curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority if a receiver in equity of the property of the

debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) of this section. The running of all statutes of limitations shall be suspended during the pendency of a proceeding under this section.

PROCEEDINGS AFTER APPROVAL OF PETITION

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the

debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and

shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20a of Title 49, as on August 27, 1935 or thereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful.

(4) The judge shall require the officers of the debtor or trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49.

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it

shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report and additional or supplemental reports at such time or times as the Commission shall desig-

nate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans; and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c), and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however*, That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

TIME FOR FILING PLAN OF REORGANIZATION; HEARINGS BY COMMISSION; CERTIFICATION OF APPROVAL TO COURT

(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by

the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

COURT HEARING AFTER APPROVAL BY COMMISSION; ACCEPTANCE OF PLAN BY CREDITORS AND STOCKHOLDERS; CONFIRMATION OF PLAN BY COURT; VALUATION OF PROPERTY

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors for each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding,

that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such re-

jection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the

court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

BINDING EFFECT OF CONFIRMATION; DISCHARGE OF DEBTOR FROM LIABILITIES; ISSUANCE OF SECURITIES

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such

transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section.

DISMISSAL OF PROCEEDINGS BECAUSE OF UNDUE DELAY IN REORGANIZATION

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall best by operation of law in the debtor unless otherwise provided by such order.

REVENUE ACTS INAPPLICABLE TO ISSUANCE, ETC., OF SECURITIES

(h) The provisions of subdivisions 1, 2, and 3 of schedule A of Title VIII of the Revenue Act of 1926, as amended by sections 721, 722, and 723 of the Revenue Act of 1932, and the provisions of subdivisions 8 and 9 of the same schedule A as added by sections 724 and 725 of the Revenue Act of 1932,[1] and any amendments thereto unless specifically providing to the contrary, shall not apply to the issuance, transfer, or exchange of securities or the making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section.

TRANSFER OF TITLE BETWEEN RECEIVERS AND TRUSTEES OR TO DEBTOR; "FEDERAL COURT" DEFINED

(i) If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court, whether before or after August 27, 1935, a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be

[1] See Title 26, Internal Revenue Code, §§1800-1802, 3480-3482.

vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee. Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section; the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtors property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

RESTRAINING OR STAYING COMMENCEMENT OR CONTINUATION OF PROCEEDINGS AGAINST DEBTOR; REMOVAL OF CAUSES; OWNERS' RIGHTS TO EQUIPMENT LEASED OR CONDITIONALLY SOLD UNAFFECTED

(j) In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continua-

tion of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated. Proceedings under this section prior to its amendment by Act of August 27, 1935, or under this section as amended by such Act, shall not be grounds for the removal of any cause of action to the United States District Court which was not removable before March 3, 1933 and any order removing any cause of action or enjoining the prosecution of any such cause of action in any court is null and void and any cause of action heretofore removed from a State court on account [sic] of this section prior to its amendment by Act of August 27, 1935, shall be remanded to the court from which it was removed. The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

CERTIFIED COPY OF ORDER CONFIRMING PLAN OR DIRECTING CONVEYANCE OF PROPERTY AS EVIDENCE

(k) A certified copy of the final order confirming a plan of reorganization, or of any other order or decree entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order or decree was made. A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subsection (f) of this section, or as specified in an order dismissing the proceedings as provided in subsection (i), shall be evidence of the transfer and conveyance of title ac-

cordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart.

JURISDICTION OF COURT, DUTIES OF DEBTOR AND RIGHTS OF CREDITORS SAME AS IN VOLUNTARY BANKRUPTCY

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

"RAILROAD CORPORATION" AND "PERSON" DEFINED

(m) The term "railroad corporation" as used in this section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

CLAIMS OF EMPLOYEES FOR PERSONAL INJURIES AND CLAIMS OF SURETIES AS PREFERRED CLAIMS; CHANGE IN WAGES OR WORKING CONDITIONS REGULATED; MOVING SHOPS, ETC., REGULATED

(n) In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a rail-

road corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended. No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

ABANDONMENT OR SALE OF LINES OR PROPERTY

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and

carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection as public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

SOLICITATION OF PROXIES OR AUTHORIZATIONS

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relat-

ing to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action: *Provided, however*, That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this sub-

section as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legis-

lation concerning the matters to which this subsection relates.

Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful; or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a misdemeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to August 27, 1935, in connection with proceedings under this section as in force prior to such date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided*, That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he

finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.

APPLICATION OF LAW GRANTING POWERS TO COMMISSION

(q) The provisions of section 12 of Title 49 shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

SEPARABILITY CLAUSE

(r) If any provision of this section, or the application thereof to any person or circumstances, is held invalid, the remainder of this section, or application of such provision to other persons or circumstances, shall not be affected thereby.

PENDING PROCEEDINGS AS GOVERNED BY AMENDMENT OF SECTION

(s) Proceedings pending under this section on August 27, 1935, shall continue under, and be governed by, the provisions of this section as amended by Act of August 27, 1935: *Provided*, That the amendment of this section by Act of August 27, 1935, shall not invalidate any action taken before August 27, 1935, pursuant to this section as it existed prior to such date. July 1, 1898, c. 541, § 77; Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474; Aug. 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969; Aug. 11, 1939, c. 689, 53 Stat. 1406.

Section 1, Paragraph (18) of the Interstate Commerce Act (U. S. C. title 49, Sec. 1, Par. (18)) provides as follows:

"Extension or abandonment of lines; certificate required. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate

any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

IN THE

# Supreme Court of the United States

October Term, 1945

No. 384

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; The Debtor, HOBOKEN MANUFACTURERS RAILROAD COMPANY; and SEATRAIN LINES, INC., a Creditor,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY; and HOBOKEN LAND AND IMPROVEMENT COMPANY,

*Respondents.*

## BRIEF FOR THE DEBTOR, HOBOKEN MANUFACTURERS RAILROAD COMPANY, AND SEATRAIN LINES, INC., PETITIONERS.


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IN THE

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*Petitioners,*

*vs.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and HOBOKEN LAND AND IMPROVEMENT COMPANY,

*Respondents.*

## BRIEF FOR THE DEBTOR, HOBOKEN MANUFACTURERS RAILROAD COMPANY, AND SEATRAIN LINES, INC., PETITIONERS.

### Opinions Below.

The opinion of the District Court of the United States for the District of New Jersey, filed August 4, 1944, is reported in 56 F. Supp. 187. It is printed in the transcript of the record herein at page 42 and again at page 80.

The opinion of the Circuit Court of Appeals for the Third Circuit, filed July 17, 1945, has not yet been printed in the official reports. It is reproduced in the transcript of the record herein beginning at page 94.

qualification of the Trustee and his entry into the possession of the properties of the railroad under the direction of the court constituted a breach of the covenant of the main stem lease against transfer, entitling the lessor Connecting Company to terminate the lease and retake the leased property. In concluding his opinion, he ruled:

> "The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with." (R. 45).

The language quoted had reference to a question which had been raised during the course of the proceedings as to whether the lessor Connecting Company could lawfully reacquire and operate the leased properties without having secured a certificate of convenience and necessity from the Interstate Commerce Commission, pursuant to Section 1 (18)-(20) of the Interstate Commerce Act, the Court evidently being convinced that the public interest required the continued operation of the railroad.

Following this opinion, appellee Land Company filed a petition for an order terminating the leases of plots A and B by reason of the tie-in agreement, and the return of these parcels to it (R. 46-49).

The lessor Connecting Company then presented to the Interstate Commerce Commission a petition for the issuance to it under Section 1 (18)-(20) of the Interstate Commerce Act of a certificate of convenience and necessity authorizing it to acquire and operate the property covered by the main-stem lease as a railroad in interstate commerce, submitting with this petition a motion to dismiss the petition on the ground that such a certificate was not required by the sections of the Interstate Commerce Act referred to. The Commission, without holding a hearing

for the receipt of evidence, dismissed the petition, ruling that the Connecting Company as the owner could lawfully operate the properties as a railroad without holding a certificate from the Commission. The Commission based its ruling upon the ground that the Connecting Company as the owner in fee of the main stem must be under a franchise obligation to maintain and operate the railroad, that the debtor-lessee Hoboken, as lessee of the railroad, operated it as agent for the lessor, and consequently that the lessor might be deemed to have been in operation through the agency of the debtor-lessee in 1920, when the provisions of Section 1 (18)-(20) were enacted. The Commission passed over the fact that the Connecting Company was not the owner of plots A and B and that there were other parcels comprising the railroad which were owned in fee by the debtor-lessee, and rejected the contention that there was a question whether the public interest could be served by the operation by the Connecting Company only of the properties of which it was the owner (R. 50-58).

It said:

> "We are not convinced that it is our duty herein to consider what practical effect the termination of the lease will have upon the operation of the properties, and in view of our conclusions it would be inappropriate for us to do so" (R. 57).

Following this decision of the Commission, the District Court on December 19, 1944 entered its Order No. 39, which is the order appealed from (R. 58-62).

By this order the District Court directed the Trustee to deliver to the lessor Connecting Company not only the main stem covered by the lease from the Connecting Company, but also plots A and B, held under leases from the Hoboken Land and Improvement Company, and all other

> "property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, cash on hand, accounts receivable, choses in action or other intangible claims and the evidences thereof; * * *" (R. 59).

Thus the property which the Trustee was directed to deliver included not only the leased property but also property owned in fee by the debtor-lessee and property as to which title was in dispute.

From this order the Trustee, the debtor-lessee and Seatrain Lines appealed to the Circuit Court of Appeals for the Third Circuit (R. 62). That court, by an opinion filed July 17, 1945, affirmed the order (R. 94-96).

While Judge FAKE had held that the covenant against transfer of the lease had been breached by the qualification of the Trustee, the Circuit Court of Appeals held "that the lease was breached when it was adopted by the Trustee" (R. 96). The court rejected appellants' contention that the order allowing termination of the lease was premature because there had been no consideration of a plan of reorganization. The grounds of this portion of the opinion are not clear, but it appears that the court considered that the requirement of Section 77 for the filing of a plan of reorganization could be disregarded. The court's holding seems to rest upon the following statement, which is incorrect and contrary to the decision of the District Court approving the petition in reorganization:

> "It appears that the Section 77 petition was filed by the debtor because it desired to procure a lease of the railroad on more favorable terms."

Finally, the Circuit Court of Appeals upheld the portion of the order directing the Trustee to transfer to the Connecting Company not only the property covered by the

leases but also property owned by the debtor-lessee or property as to which title was in dispute. It did so on the ground that such property was small and that the order requiring such transfer "is a wise one for it permits the operation of this small trackage as a part of the main stem of the railroad". (R. 97).

It is the interest of the debtor-lessee to oppose the transfer ordered by the court because Section 77 places upon the debtor the burden and responsibility of presenting a plan of reorganization and because the property which the court below would cause the Trustee to transfer constitutes its railroad, which it seeks to continue to operate when reorganization can be effected. Seatrain's interest in opposing the order arises from the fact that it is a large creditor of the debtor-lessee and also owns all of the stock of the latter, whose value, obviously, is contingent upon its ability to continue to operate as a railroad in interstate commerce.

## Specification of Assigned Errors To Be Argued.

1. The District Court erred in entering its Order No. 39 and the Circuit Court of Appeals erred in affirming that order.

2. The District Court erred in holding that the qualification of the Trustee, appointed by the court in a proceeding for the reorganization of debtor-lessee under Section 77 of the Bankruptcy Act for the purpose of conserving the railroad property and making possible the continued operation of the railroad, constituted a breach of the covenant in the lease against transfer entitling the lessor to enforce forfeiture and thereby frustrate the reorganization.

3. The Circuit Court of Appeals erred in holding that the adoption of the lease by the Trustee for the purpose of keeping the property together for continued operation and

the effectuation of a plan of reorganization constituted a breach of the covenant of the lease entitling the lessor to enforce forfeiture and frustrate the reorganization.

4. The courts below erred in failing to hold that if the qualification of the Trustee or the adoption of the lease constituted an unauthorized transfer within the language of the covenant of the lease as strictly construed, the covenant was contrary to the policy of Section 77 and could not be enforced in a proceeding for a reorganization thereunder.

5. The courts below erred in failing to give effect to the language and purpose of Section 77 to preserve railroad properties and provide for their continued operation.

6. The courts below erred in failing to hold that in advance of a plan of reorganization and without the approval of the Interstate Commerce Commission the railroad properties of the debtor-lessee could not lawfully be transferred.

7. The courts below erred in holding that all of the railroad properties of the debtor-lessee should be delivered to the lessor in the absence of authority from the Interstate Commerce Commission for the debtor-lessee and the Trustee to abandon and discontinue operations of its railroad and authority for the lessor to acquire and operate the railroad property.

8. The courts below erred in holding that all of the railroad property of the debtor-lessee, including property held under lease from the Hoboken Land and Improvement Company and property owned by the debtor-lessee as to which there were undetermined claims, should be transferred and delivered to the Connecting Company.

## Summary of Argument.

I. Even if the language of the covenant of the lease were to be construed as providing for forfeiture of the lease and return of the property to the lessor upon resort by the debtor-lessee to the reorganization procedure afforded by Section 77 of the Bankruptcy Act, the covenant would be unenforceable as contrary to the Act and the public policy that the railroad shall be kept together for continued operation and its reorganization submitted to the Interstate Commerce Commission.

Section 77, unlike other provisions of the Bankruptcy Act, has for a primary purpose the protection of the public interest in the continued operation of railroads as distinguished from the interest of creditors and stockholders. To this end, it is the purpose of the Act that railroad property shall be held together for operation pending completion of a plan of reorganization; that the plan of reorganization shall be considered by the Interstate Commerce Commission; and that no property shall be abandoned or transferred pending reorganization of the operating company without the approval of the Commission. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Palmer* v. *Massachusetts*, 308 U. S. 79; *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648; *Van Schaick* v. *McCarthy*, 116 F. (2d) 987; *In re Central of Georgia Ry. Co.*, 48 F. Supp. 445; *Collier on Bankruptcy*, (14th Ed.), Vol. 5, p. 468.

With a large part of the railroad mileage of the country operated under lease, the public purpose of Section 77 would be defeated pending reorganization if a lessor could demand forfeiture of a lease on the ground that resort to the reorganization proceedings violated a covenant against transfer.

Even if there was an unauthorized transfer within the language of the lease, the covenant is unenforceable be-

cause contrary to Section 77 and the public policy evidenced thereby. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467.

II. Neither the filing of the petition for reorganization, the qualification of the Trustee nor the Trustee's adoption of the lease constituted a breach of the covenant against transfer.

A provision for forfeiture of a lease is to be narrowly construed against the lessor. *Gazlay* v. *Williams*, 210 U. S. 41; *Collier on Bankruptcy* (14th Ed.), Vol. 4, pp. 1240, 1241.

The covenant in the lease here involved as so construed was not violated by the qualification of the Trustee or by his adoption of the lease for the preservation of the properties of the debtor pending reorganization. There was no express reference in the covenant to bankruptcy or reorganization. There was no unauthorized transfer because what was done was authorized by the statute. There was no sale or transfer within the intent of the covenant because the covenant was plainly aimed at transfers which would eliminate the original lessee, whereas the whole purpose of the proceeding here is to fulfill the lessor's obligations out of the lessee's assets and preserve the lease for continuance by the lessee after reorganization.

A trustee in reorganization under Section 77 does not hold a debtor's property for the purpose of liquidation. Under Section 77 and the Interstate Commerce Act railroad property may not be disposed of by a trustee except with the approval of the Commission or pursuant to a plan of reorganization approved by the Commission.

If the lessee should be reorganized pursuant to voluntary agreement of its creditors and stockholders, there would be no transfer in violation of the covenant and the

fact that the reorganization is conducted under the procedure provided by Section 77 does not alter the situation.

III. In advance of a plan of reorganization, the attempted cancellation of the lease and the courts' orders permitting such cancellation were premature.

The qualification of the Trustee did not entitle the lessor to cancel the lease because all rights under the contract were held in suspense by Section 77 and the reorganization proceeding thereunder.

Section 77 provides that a plan of reorganization may adopt or reject executory leases and allows a reasonable time for the formation of the plan. Meanwhile, the provisions of a lease and any rights of the lessor thereunder are held in suspense and forfeiture of the lease cannot be claimed on the ground of alleged violation of its provisions. *Warren* v. *Palmer*, 310 U. S. 132; *Palmer* v. *Palmer*, 104 F. (2d) 161; cert. den. 308 U. S. 590; *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648.

The adoption of the lease by the Trustee was simply for the purpose of preserving the property for effectuation of a plan of reorganization and, therefore, did not alter the fact that rights under the lease were held in suspense until the lease should be adopted or rejected in the plan of reorganization. Any other view would mean that the District Court's order directing the Trustee to adopt the lease for the purpose of preserving the property pending the plan of reorganization defeated the purpose for which the order was made.

IV. The order of the District Court permitting the lessor Connecting Company to cancel the main stem lease and directing the Trustee to convey to the Connecting Company not only the property covered by that lease but also all other railroad property used or operated by the debtor-lessee violated Section 77 of the Bankruptcy Act and Sec-

tion 1(18) of the Interstate Commerce Act and was contrary to the condition imposed by the court in its opinion.

The Trustee could not lawfully transfer the property and abandon operation of the railroad in the absence of a certificate of convenience and necessity from the Interstate Commerce Commission authorizing it to do so.

The requirement that a certificate authorizing abandonment be secured applies to discontinuance of operations by a lessee on termination of a lease. *Warren* v. *Palmer*, 310 U. S. 132; *Palmer* v. *Massachusetts*, 308 U. S. 79; *Lehigh Valley R. Co., Abandonment of Operation*, 202 I. C. C. 259.

The lessor Connecting Company may not lawfully acquire and operate as a railroad the properties to be conveyed to it pursuant to the District Court's order since it has not secured a certificate of convenience and necessity from the Interstate Commerce Commission authorizing it to do so.

The decision of the Commission that the Connecting Company was not required to obtain a certificate before reacquiring and operating the property was in error and did not excuse the court's Order No. 39. The Connecting Company was not a common carrier by railroad, operating as such, when Section 1 (18) of the Interstate Commerce Act was enacted. Therefore, it may not acquire and operate railroad property without obtaining a certificate. The Commission's theory that the Connecting Company was operating through the agency of the debtor-lessee was erroneous, disregarded the separate estate of the debtor-lessee, and was inconsistent with the decisions requiring a lessee to obtain a certificate before beginning or abandoning operation. *Transit Commission* v. *United States*, 289 U. S. 121; *Livestock Terminal Service Co., Abandonment*, 257 I. C. C. 1.

The Commission's decision that the Connecting Company is not obligated to obtain a certificate because it is

under a franchise obligation to operate its property is inconsistent with the decisions holding that state contracts or franchises do not prevail over the requirements of Section 1 (18)-(20) of the Interstate Commerce Act. *Transit Commission* v. *United States*, 289 U. S. 121; *Texas &c. R. R.* v. *Northside Ry.*, 276 U. S. 475; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331.

In any event the Commission's theory has no application here because it does not extend to plots A and B and property owned by the debtor-lessee which are not owned by the Connecting Company and, so far as appears from the record, have never been operated by it.

V. Order No. 39 should be reversed because it transfers to the lessor possession of certain railroad property owned by the debtor-lessee before determination of conflicting claims thereto.

## ARGUMENT.

### POINT I.

**Even if the language of the covenant of the lease were to be construed as providing for forfeiture of the lease and return of the property to the lessor upon resort by the debtor-lessee to the reorganization procedure afforded by Section 77 of the Bankruptcy Act, the covenant would be unenforceable as contrary to the Act and the public policy that the railroad shall be kept together for continued operation and its reorganization submitted to the Interstate Commerce Commission.**

This case deals with the reorganization of a railroad. Section 77 relates only to railroads and its provisions reflect both the paramount public interest in the continued

operation of railroads and the special machinery provided in order to protect this public interest and to deal with the peculiar problems involved in so doing.

The objectives and the intentions of Congress in enacting Section 77 were discussed at some length in the opinion of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1942). Mr. Justice REED, speaking for the Court, said (p. 468):

> "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.
>
> "It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many-sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of reorganization, fair to the public, creditors and stockholders. The resulting legislation was an attempted balance between the power of the Commission and that of the court."

The opinion then reviews in considerable detail the legislative history of the statute. This discussion makes it clear that Congress was concerned above all that the interest of the public should be protected, that railroad operations should not be interrupted by the financial difficulties of the railroads or the enforcement of the rights of those having claims against them, and that to this end the Interstate Commerce Commission's informed experience was given a large place in the handling of each situation.

Since in the case of railroad reorganizations, the major purpose is the protection of the public interest in the continued operation of a railroad until the Commission shall determine that its services are not needed, one of the objectives of Section 77 is to hold the railroad's properties together for operation. This brings Section 77 into sharp contrast with other portions of the Bankruptcy Act where the claims of creditors are paramount and the purpose of the provisions is to achieve a marshalling of a debtor's assets for liquidation or other disposition for the protection of those having claims against the debtor.

*Collier on Bankruptcy* (14th Ed.), Vol 4, p. 468, says that Section 77

> "reflects a public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders."

In *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, the Court said at page 671:

> "Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railway corporations had been definitely excluded from the operation of the law in 1910 (c. 412, § 4, 36 Stat. 838, 839), probably because such corporations could not be liquidated in the ordinary

way or by a distribution of assets. A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.'"

This important purpose of Section 77 has been stressed by the courts in other cases. In *Van Schaick* v. *McCarthy*, 116 F. (2d) 987, (C. C. A. 10th, 1941) the Court said (p. 992):

> "Sec. 77 has for its main purpose the rehabilitation of the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof. During the process of reorganization it contemplates the continued corporate existence of the debtor under the control and supervision of the court."

And in *In re Central of Georgia Ry. Co.*, 48 F. Supp. 445 (D. C., S. D. Georgia), aff'd in 135 F. (2d) 592 (C. C. A. Fifth), the Court emphasized that the purpose of Section 77 was to keep the railroad properties together until a plan of reorganization could be worked out. It said (p. 449):

> "To permit the steamship line to be divorced from the railway at this time is tantamount to a dismemberment of the system. If I properly under-

stand the philosophy of section 77 of the Bankruptcy Act as amended, 11 U. S. C. A. 205, under which these proceedings were taken, among other things, it was to prevent the disintegration of a railway by parceling out the mortgaged property in divisions or according to prior liens, and to preserve it as a unit of the national transportation system until reasonable opportunity has been furnished to develop and submit a plan of reorganization which will be fair and equitable to all of the interests concerned. If at the very time the trustee, his advisory committee, and the several bondholders' committees are attempting to develop such a plan they are met with the threat that the steamship company, regarded by many of them as an integral part of the system, is to be withdrawn and liquidated or operated independently of the railway, they will be denied what I consider a reasonable opportunity through negotiation to reorganize the system as a whole."

Section 77 evidences the intention of Congress, not only that the properties of a railroad shall be kept together for its continued operation, but also that the Commission shall have a major role in its reorganization in the interest of the public.

Thus by subdivision (o) it is provided that the Trustee may dispose of properties of a railroad or may be ordered by the Court so to do only

> "with the approval and authorization of the Commission when required by chapter 1 of Title 49 * * * ".

Even a line held under a lease which is rejected must be operated

> "until the abandonment of such line is authorized by the Commission * * * " [subd. (c) (6)].

And, most important, the main feature of Section 77 is its requirement [subd. (d)] that the debtor shall file a plan

of reorganization, that this shall then be considered by the Commission, and that the Commission

> "shall render a report and order in which it shall approve a plan * * *".

The decisions are full of expressions by the courts stressing the important part which Congress intends the Commission to play in railroad reorganization proceedings under Section 77.

*Ecker* v. *Western Pacific Corporation*, 318 U. S. 448;

*Collier on Bankruptcy* (14th ed.), Vol. 5, p. 469.

In *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939), Mr. Justice FRANKFURTER, speaking for this Court, said (pp. 86-87):

> "But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

It is obvious that these important purposes of Section 77 would be defeated if a covenant in a lease against transfer could be construed and enforced as working a forfeiture of the lease upon the qualification of a trustee in a reorganization proceeding or upon his adoption of a lease for the purpose of preserving the railroad as an entity pending the preparation and approval of a plan of reorganization.

It is well known that a large part of the railroad mileage of the country is held by the operating railroads under long term leases.* Congress must have contemplated that the objectives sought by Section 77 should not be defeated by permitting resort to the procedure provided by the statute to be the cause of forfeiture of such leases.

Hence we submit that even if the covenant of the lease here involved should be construed as including the qualification of a trustee in reorganization or his adoption of the lease as one of the causes of forfeiture provided for therein, the clause would be and is rendered unenforceable by reason of Section 77 itself. If the choice is between accomplishing the public purpose of the statute and carrying out its provisions on the one hand and giving full effect to the language of a lease on the other hand, the lease must yield. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467.

It is recognized, of course, that in situations under other provisions of the Bankruptcy Act, effect has been given to forfeiture clauses in leases when such clauses have met the test that to be enforceable they must refer to bankruptcy and transfer by operation of law in specific terms. This is expressly provided for in Section 77B, and it is on this that the Court rested its decision in *Finn* v. *Meighan*, 65 S. Ct. 1147, cited by the Court below (R. 96). But in

* Healy, *The Economics of Railroad Transportation* (1940), at page 302 states that 28,524 miles of railroad, or 12 per cent of the total mileage operated in the United States, are operated under lease.

these situations the matter has concerned only the debtors and their creditors. The public has not been involved, as it is in the reorganization of a railroad.

Illustrative of this difference and of significance for the purposes of this case is the absence from Section 77 of the provision written into Section 110 (b), which constituted the basis of the decision in *King* v. *Meighan*, 65 S. Ct. 1147, that

> "an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

The court below appears to have held that sub-paragraph (l) of Section 77 in some way makes Section 110 (b) applicable here. It is submitted, however, that this is incorrect.

Subdivision (l) provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Thus, although it is said that "the rights and liabilities of creditors * * * with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed", nevertheless the subdivision expressly provides that this is so only so far as "consistent with the provisions thereof" (Section 77). The forfeiture of a lease of an important part of a railroad's right of way

would certainly not be consistent with the purposes of Section 77 or with the provisions thereof, including the provision for a plan of reorganization and the provision that such a plan may provide for the adoption or rejection of unexpired leases.

## POINT II.

**Neither the filing of the petition for reorganization, the qualification of the Trustee nor the Trustee's adoption of the lease constituted a breach of the covenant against transfer.**

It is well settled that provisions for forfeiture of leases are to be narrowly construed. They must be construed strictly, not only in accordance with their own language but also in the light of the provisions and purposes of applicable statutes. It has accordingly been held that a general covenant not to assign or transfer is not breached by a petition in bankruptcy so as to permit the landlord to assert a forfeiture. Only if the lease specifically and in express terms provides that it shall terminate upon bankruptcy is it held that bankruptcy works a forfeiture.

*Gidlay* v. *Williams*, 210 U. S. 41;
*In re Prudential Lithograph Co.* (D. C. N. Y.), 265 Fed. 869; aff'd 270 Fed. 469; cert. den. 256 U. S. 692;
*In re Levinson*, 295 Fed. 146 (D. C. W. D. Wash. N. D. 1923);
*In re Gutman*, 197 Fed. 472;
*Collier on Bankruptcy* (14th Ed.), Vol. 4, pp. 1240, 1241.

This principle, that effect will not be given to a forfeiture clause except in strict accordance with its express terms, narrowly construed, has especial force in a proceed-

ing such as this involving the reorganization of a railroad, where the public interest is concerned.

It is submitted that under this principle it cannot properly be held here that there has been a breach of the lease involved in this suit.

The lease does not specify "reorganization", "bankruptcy" or even "transfer by operation of law".

Looking at the covenant in the main-stem lease, Article Third, paragraph (1) (R. 64, 65), it is plain that neither the inauguration of the reorganization proceedings, the qualification of the Trustee nor the adoption of the lease by the Trustee violated the language of the first part of the paragraph, whereby it was provided that:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, * * *" (R. 64).

So far this is a typical covenant against assignment, and the cases previously cited are conclusive that such a clause does not afford a right to terminate upon bankruptcy, much less because of what is done in a reorganization proceeding.

The claim of the lessor and the decisions of the courts below rest, therefore, on the last sentence of the paragraph, that:

> "This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, * * * whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor * * *" (R. 65).

It is submitted, however, that there has been no breach of this clause.

In the first place, what is meant by an "unauthorized" transfer? Certainly the procedure provided by statute to enable a railroad to continue in operation in the service of the public cannot be regarded as "unauthorized". Assuming for the moment that there was a "sale or transfer", to hold that it was "unauthorized" would mean that by the use of that term the parties intended to contract that the railroad operating over the leased property should be forever barred from resorting to any procedure which might thereafter be provided by statute fo the purpose of enabling it, in time of need, to reorganize its liabilities so that it should be able to continue to operate and to carry out the terms of the lease. Such a conclusion would place an unreasonable meaning on the word "unauthorized".

But it is submitted further that neither the filing of the petition, the qualification of the Trustee nor the Trustee's adoption of the lease, pursuant to the court's order, constituted a "sale or transfer * * * or underletting of the demised premises". Obviously none of these acts constituted a "sale" or an "underletting". Was any of them a "transfer" within the meaning of this language as properly interpreted? Not all transfers are barred by the covenant. It is only a transfer by which "the rights, duties, and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered" which is within the prohibition of the covenant. This makes it necessary to consider what really takes place when a trustee qualifies or when a lease of a railroad is adopted by a trustee in a reorganization proceeding.

A trustee in an ordinary bankruptcy proceeding takes the debtor's property for the purpose of liquidating it for the benefit of creditors. The expectation is that the assets will be sold and the bankrupt's title to and interest therein will be extinguished. This is plainly what was contem-

plated by the language of the lease involved here. But we submit that neither the qualification of the Trustee nor his adoption of the lease came within the intent of this language because the Trustee does not take the property to liquidate it.

In the reorganization of a railroad under Section 77, as we have shown under the previous point, the Trustee takes the property to conserve it for the debtor. Although the statute in subsection (c) (2) says that "The trustee * * * shall have all the title * * * of a trustee appointed pursuant to section 72", this is subject to the proviso that he may exercise his powers only "subject to the control of the judge and consistently with the provisions of this section." The trustee, by virtue of subdivision (o), may sell or abandon any part of the debtor's property or right of way only when he determines that this can be done "without unduly and adversely affecting the public interest.", and also only pursuant to an order of the judge after hearing on notice to parties in interest, and then only with the approval and authorization of the Interstate Commerce Commission when required by Section 1(18) of the Interstate Commerce Act, none of which conditions has been met here.

Except under the foregoing conditions the trustee may not sell the leasehold or any other asset, nor may the judge direct him to do so. The property may ultimately be disposed of only in accordance with a plan of reorganization approved by the Interstate Commerce Commission and then confirmed by the court. The only other exception to this is the right of a trustee to reject executory contracts.

Thus the trustee holds the debtor's property, not for the sake of disposing of it, but for the purpose of keeping it intact as a going railroad and of returning it to the debtor when a plan for reorganizing the debtor's obligations and capital structure has been worked out. In other words,

upon adoption of the lease and until a plan of reorganization becomes effective the trustee really holds the property for the debtor, he pays the debtor's obligations under the lease from the debtor's funds and, in effect, for the debtor's account. And unless the plan of reorganization provides for the rejection, as provided for under subsection (b) of Section 77, or modification of the lease, the debtor or lessee resumes all of its rights and obligations thereunder for itself.

In short, we submit that what transpires when a trustee in a railroad reorganization adopts a lease is not a transfer of the sort described by the covenant involved here, in that it does not permanently transfer nor does it of itself encumber, abrogate or alter the rights, duties and obligations of the lessee. It preserves them.

If a corporation worked out a reorganization of its capital structure by agreement among its security holders and continued to carry out the terms of any lease or executory contract which it might have, it could not be claimed that there was a transfer or assignment of a lease which would constitute a breach of a covenant against assignment. The tenancy would be uninterrupted. This is exactly the result here if a lease is adopted. The reorganization is carried on under the supervision of the court and the Interstate Commerce Commission instead of by voluntary agreement among the security holders and creditors, but it is nevertheless a reorganization and not a liquidation or distribution and transfer of assets. The trustee's function is to preserve the debtor's estate during the accomplishment of reorganization and carry out all of the terms of the lease on behalf of the debtor. When the plan of reorganization is worked out and the reorganization completed, if the plan provides for the adoption of the lease by the debtor there will, in effect, have been no interruption whatever in the debtor's occupancy of the premises and performance of

the terms of the lease. It is only if there were a sale or abandonment authorized by subdivision (o.) or if the lease should ultimately be rejected that there would be any transfer of the lease or leased premises from the debtor-lessee and the latter would be a transfer to the landlord.

Moreover, we submit that it cannot be said that the adoption of the lease by the Trustee was "without the consent of the Lessor", because the statute itself provides the consent. Any other view, as we have said previously, would mean that the parties by their lease in 1906 intended to contract that the debtor-lessee should never have the right to use legal machinery for reorganization to enable it to continue to fulfill the lease for the period of its term. We submit that such a view imposes an unreasonable sense upon simple words. Certainly it would not constitute a construction of the language of the forfeiture clause strictly against forfeiture as required by the cases previously cited.

It may be observed, also, that a contrary conclusion would produce the anomalous result that the lower court, by its own act in directing the Trustee to adopt the lease, would be the cause of a termination of the lease by the landlord, which would defeat the very adoption by the Trustee which the court directed. If this were the law the lower court should not have directed the adoption of the lease but should, as he had the right to do, have allowed the matter of rejection or adoption to await the submission of a plan of reorganization, in which event, in accordance with the authorities cited under the next point, all rights of the landlord under the lease would have been held in suspense.

Finally, on this point, we submit if of two possible interpretations of the language of the lease one will render the contract valid while the other will make it unenforceable and against public policy, the former is the one which must be adopted. As we have argued in the first point, if

the covenant here should be construed as giving the landlord the right to cancel the lease under the circumstances here, it would be contrary to public policy as disclosed by the enactment of Section 77 of the Bankruptcy Act and the Interstate Commerce Act.

## POINT III.

**In advance of a plan of reorganization the attempted cancellation of the lease and the courts' orders permitting such cancellation were premature.**

This is, perhaps, merely a restatement of the first point. It is plain from the provisions of Section 77 that the intention of Congress was that railroad properties should be held together until a plan of reorganization should be evolved, filed and approved. The statute says that the plan shall be filed by the debtor; that the plan shall provide for either the adoption or the rejection of executory contracts or leases; and that the plan when filed shall then be considered by the Commission which, after hearing, "shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed". The plan and the Commission's consideration and report on it are the central features of the scheme of Section 77.

Hence, until a plan has been filed and considered, it is premature to permit any disposition to be made of the railroad's properties. To this there are only two exceptions, previously referred to, neither of which is applicable here. The first is the rejection of a lease or executory contract as burdensome to the debtor's estate. But even in case of such rejection, the operation of the railroad must be continued unless and until the Commission permits its abandonment [Subdivision (c) (6)]. *Warren* v. *Palmer*, 310 U. S. 132 (1940). The Trustee here has not rejected the lease, he has adopted it. The other exception is pro-

vided for by subdivision (6) which empowers the Trustee if he determines that a line or other property "should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization" to sell or abandon such line or property. But here also the approval of the Commission is a prerequisite. The Trustee has made no such determination, nor could he do so. And the Commission has not approved or authorized the Trustee to part with the property covered by the Court's Order No. 39.

Hence we submit that since the plan of reorganization contemplated by Section 77 has not yet been filed, since it has not been determined whether the leases are compatible with such a plan, it is entirely premature to permit the debtor's property to be taken from the Trustee, thereby completely frustrating the plan and the carrying out of the provisions of Section 77. It must be the effect of Section 77, therefore, to hold everything in abeyance until a plan of reorganization is filed and approved. Otherwise Section 77 would be unworkable.

This will more clearly appear if the decisions of the District Court and of the Circuit Court of Appeals are considered separately.

**A. The qualification of the Trustee did not entitle the lessor to cancel the lease because all rights under the contract were held in suspense by Section 77 and the reorganization proceeding thereunder.**

As previously observed there is a strange inconsistency between the decision of the District Court as set out in Judge FAKE's opinion and the Circuit Court's ruling. Judge FAKE held (R. 44, 48) that it was the qualification of the

Trustee and his coming into theoretical possession of the property of the debtor-lessee which constituted the transfer which violated the covenant of the lease. This was what the lessor had alleged; it was on the basis of this that the lessor gave its notice of cancellation (R. 35). The Circuit Court of Appeals held, however, that it was the adoption of the lease by the Trustee which constituted the breach of the covenant (R. 96).

Considering only Judge FAKE's view of the matter, and disregarding the inconsistency in his own action in thereafter ordering the Trustee to adopt the lease (R. 38, 39) which on his theory had been cancelled, it is submitted that when the Trustee was appointed and qualified, the lease was in suspense by virtue of Section 77 so that it could not be violated, and the lessor's rights to enforce its provisions were likewise in suspense.

It is plainly the intent of the statute and it seems well settled that in a reorganization proceeding a reasonable period of time is allowed for the preparation and filing of a plan of reorganization which will provide either for the adoption or for the rejection of leases and other executory contracts, and that meanwhile breaches of such contracts may not be asserted or enforced in suits. An owner of leased property is, of course, entitled to just compensation for its use—but on a *quantum meruit* basis rather than by virtue of the terms of his lease.

The leading case on this point is *Palmer* v. *Palmer*, 104 F. (2d) 161 (C. C. A. 2nd, 1939); cert. den. 308 U. S. 590, where it was held that a lessor of property of a railroad in reorganization could not cancel a lease for breach of a covenant to pay rent. Judge LEARNED HAND, in writing the opinion of the Circuit Court of Appeals, said (p. 163):

> "A lease, being property *cum onere*, does not pass to a trustee in bankruptcy, unless he adopts it."

He remarked that if the question were to arise for the first time it might be difficult to see

> "by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term, for instance, the payment of any rent, secured by a right of reentry."

But he went on to say:

> "Nevertheless, the contrary has been generally held; and the trustee's adoption of the term is said to 'relate back' to the beginning of the proceeding, or at least to adjudication. The reason for this is not clear. It does not follow from § 70 of the Bankruptcy Act, 11 U. S. C. A. § 110, which vests the trustee's title only 'by operation of law'; for title to the term vests not by operation of law at all, but only by the trustee's adoption. Be that as it may, the trustee need not pay the rent during the probationary period, and the court will hold off the lessor, and force him to be content with the value of the use and occupation meanwhile, though ordinarily it will fix that at the same amount as the rent. This was the result in Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, and in United States Trust Co. v. Wabash Railway, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085, though so many other circumstances were thought relevant that we are not clear as to the precise scope of either ruling. But we have ourselves a number of times declared that the trustee's title 'relates back', or that he is liable only for use and occupation, and in some instances what we said was necessary to the result. In Re Frazin, supra, 183 F. 28, 32; In re Sherwoods, 2 Cir., 210 F. 754, Ann. Cas. 1916A, 940; Johnson v. Emerson Phonograph Co., 2 Cir., 296 F. 42, 45; Heineman Corp. v. Levy & Co., 2 Cir., 6 F. 2d 970, 975; In re United Cigar Stores Co., 2 Cir., 69 F. 2d 513, 515; Central Manhattan Properties v. D. A. Schulte, 2

Cir., 91 F. 2d 728, 730. Whether justified in principle or not, the doctrine has by now become too well fixed to be uprooted, especially since no change was made when the whole subject was overhauled in the Chandler Act."

The same principle was recognized by this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, in which it was held that the District Court, acting under the provisions of Section 77, could delay by injunction the enforcement of a contract which empowered the Continental Bank and other lenders to sell collateral pledged as security for loans made to the debtor, on failure to pay interest, insolvency of the debtor or the appointment of a receiver for its properties. At pages 676 and 677 the Court said:

"The injunction does not infringe § 67 (d), U. S. C. Title 11, § 107 (d). The substance of that provision is that bona fide liens shall not be affected by anything contained in the Bankruptcy Act. The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton* v. *New*, 283 U. S. 318, 321, and cases cited. A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised. So far as constitutional power is concerned, there is no difference between an injunction restraining the enforcement of

> a real-estate mortgage and one restraining the enforcement of a pledge by the sale of collateral security. Such differences as exist affect not the power but the propriety of its exercise—that is to say, the discretion of the court. Such an injunction, as just indicated, is within the contemplation of § 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section. Compare *Straton* v. *New*, *supra*. Nor does § 57 (h), 11 U. S. C. § 93 (h), also invoked by petitioners, have any pertinent application to the question under discussion in the light of the provisions, purpose and aim of § 77."

See also *United States Trust Co.* v. *Wabash Rwy. Co.*, 150 U. S. 287, 299, 300.

In an illuminating article discussing at length various problems in connection with railroad reorganizations under Section 77, *Railroad Leases and Reorganization*, 49 Yale Law Journal 140, Professor Mack, citing the foregoing and other decisions, concludes (p. 1413) that for a trial period which

> "in modern reorganizations—will and should be somewhat longer than that accorded under old equity practice" (p. 1414)

during which a trustee may determine whether to adopt or reject a lease,

> "The court may prevent the Lessor from retaking its properties for this period without payment of any rent whatever" (p. 1413).

If the lessor may not cancel a lease and retake the property for breach of a covenant to pay rent, equally it may not do so for breach of a covenant against transfer.

**B. The adoption of the lease by the Trustee in advance of a plan of reorganization did not entitle the lessor to cancel it for breach of the covenant against transfer.**

We submit that the opinion of the Circuit Court of Appeals that

> "the lease was breached when it was adopted by the trustee" (R. 96)

is equally inconsistent and unsound. The purpose of keeping the property together and holding off creditors and lessors is to insure the continued operation of the railroad and make it possible to formulate and carry out a plan of reorganization. The Trustee here adopted the lease for that very purpose (R. 36). The court directed him to do so on his petition asserting that purpose (R. 38). It would be anomalous, to say the least, if the court by its order defeated the very purpose for which the order was made.

Subdivision (b) of Section 77 expressly states that a plan of reorganization

> "may reject contracts of the debtor which are executory in whole or in part, including unexpired leases."

And it provides further that:

> "The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder."

In other words, the Trustee's adoption is an interim affair. It does not bind or affect the plan. It is the plan which is finally to determine whether a lease is to be adopted and continued in force or is to be rejected. Hence, on the authority of the cases cited under the previous point, the effect of the statute must be to hold in suspense all leases

and the rights of lessors thereunder for final disposition in the reorganization plan.

In *Van Schaick* v. *McCarthy*, 116 F. (2d) 987 (C. C. A. Tenth), previously cited, the Court said:

> "Sec. 77 provides for the submission of the plan to the Interstate Commerce Commission, for a public hearing before the Commission, for a certification of the plan to the court, and for a hearing before the court. It further provides that if the judge does not approve the plan, he may refer it back to the Commission for further action. It is manifest that a considerable period of time must necessarily elapse before a satisfactory and proper plan can be worked out and receive the requisite approval. During that period the railroad company must be operated by the trustees under the supervision and control of the court in the public interest and for the protection of the private interests involved, and to that end such expenditures must be made as are reasonably necessary to preserve and protect those interests and maintain the integrity of the railroad, so that it may be turned over to the reorganized company as a going concern. Sec. 77 contemplates that the reorganized road shall be a living, not a dying, railroad enterprise."

## POINT IV.

**The order of the District Court permitting the lessor Connecting Company to cancel the main stem lease and directing the Trustee to convey to the Connecting Company not only the property covered by that lease but also all other railroad property used or operated by the debtor-lessee violated Section 77 of the Bankruptcy Act and Section 1 (18) of the Interstate Commerce Act and was contrary to the condition imposed by the Court in its opinion.**

### A. The Trustee could not lawfully transfer the property and abandon operation of the railroad in the absence of a certificate of convenience and necessity from the Interstate Commerce Commission authorizing it to do so.

The provisions of Section 77 of the Bankruptcy Act are tied into and have a common purpose with Section 1 (18) of the Interstate Commerce Act, to insure the continued operation of a railroad in the public interest by the carrier engaged in that operation until transfer of the railroad properties and abandonment of operations are authorized by the Interstate Commerce Commission.

Section 1 (18) of the Interstate Commerce Act provides, in part, that:

> "After ninety days after this paragraph takes effect * * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

It goes without saying that the return of the main stem to the Connecting Company and the transfer to the Connecting Company of all the railroad property of the debtor-lessee, as required by the District Court's order, would mean an abandonment by the Trustee or the debtor-lessee of the operation of the railroad which the latter has operated since June 19, 1906.

The Commission has consistently held as an administrative interpretation of Section 1 (18) that a railroad operating leased property may not terminate its lease and discontinue operations without a certificate from the Commission. *Lehigh Valley R. Co. Abandonment of Operation*, 202 I. C. C. 659; *Norfolk S. R. Co. Receivers Abandonment*, 221 I. C. C. 258; *Duluth & I. R. R. Co. Control*, 224 I. C. C. 353.

It is submitted that this requirement of the Interstate Commerce Act, designed to insure continued operation of a railroad by a lessee, superseded and controls the provisions of the lease here involved, even assuming for the sake of argument that the qualification of the Trustee or his adoption of the lease would otherwise be a breach of the covenant against transfer.

Moreover, the provisions of Section 77 make it very clear that a Trustee may not convey or relinquish railroad property required for the operation of the railroad, nor may the court order him to do so, without the approval of the Interstate Commerce Commission, except only by rejecting an unexpired lease or executory contract. Even in the case of rejection of a lease, subdivision (c) (6) makes specific provision for the continued operation of a railroad "until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1." *Warren* v. *Palmer*, 310 U. S. 132 (1940). Of course the lease here has not been rejected but has been adopted by the Trustee.

The ultimate continuance or discontinuance of service is a matter for the Commission. *Webster & Atlas Nat. Bank of Boston v. Palmer*, 111 F. (2d) 215 (C. C. A. Conn.).

In *Palmer v. Massachusetts*, 308 U. S. 79, 87, 88, this Court said:

> "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission. Thus, in § 77(c) and § 77(o) *the power of the district courts to permit abandonment is specifically conditioned on authorization of such abandonments by the Commission.*" (Italics ours.)

Here no authority in any form has been secured from the Commission by the Trustee or the debtor-lessee to discontinue the operation of the railroad or to relinquish possession of or transfer any of the railroad properties essential for such operation. Hence, we submit that the District Court could not lawfully make its Order No. 39 which would have that result.

**B. The lessor Connecting Company may not lawfully acquire and operate as a railroad the properties to be conveyed to it pursuant to the District Court's order since it has not secured a certificate of convenience and necessity from the Interstate Commerce Commission authorizing it to do so.**

Section 1 (18) of the Interstate Commerce Act also provides, in part, that ninety days after it takes effect

> "no carrier by railroad subject to this part * * * shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the * * * operation * * * of such additional or extended line of railroad, * * *."

This statute, which was enacted in 1920, in effect requires anyone who was not then operating a railroad to obtain a certificate from the Commission before acquiring and operating one. This has been held to apply to the acquisition by one party of a railroad already being operated by another. *Wyoming & M. R. Ry. Co. Application*, 79 I. C. C. 121; *Bonhomie & H. S. R. Co. Acquisition*, 90 I. C. C. 448; *Great Northern Pac. Ry. Co. Acquisition*, 162 I. C. C. 37.

The Connecting Company was not an operating railroad company when Section 1 (18) of the Interstate Commerce Act became law. It is submitted that it may not now lawfully acquire or operate a railroad without securing a certificate of convenience and necessity from the Commission. This it admittedly has not done.

It is true, of course, and the court below relied on the fact, that the Connecting Company had applied to the Commission for such a certificate and the Commission had dismissed its application upon a ruling that since it was the owner of the leased property and by termination of the lease was taking back property owned by it, it did not need a certificate to reacquire such property and operate it as a railroad. It is submitted that this decision of the Commission was erroneous as a matter of law and should not have been accepted by and does not excuse the action of the court below.

The reasoning of the Commission was, in effect, that the Connecting Company has really been operating the railroad all the time through the agency of its tenant. This is unsound. A tenant is in no sense an agent of its landlord but operates in its own right and by virtue of its lease has an estate in the property separate and distinct from that of the lessor.

*Tiffany, Law of Real Property*, 3rd Ed. Sections 76, 79, 99.

The Commission argued further that the Connecting Company was under a continuing obligation by reason of its franchise to operate the railroad properties and that, therefore, "No certificate from us is needed because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit" (R. 56-57). This is, again, the agency theory. It is contrary to the provisions of Section 1 (18) of the Interstate Commerce Act, which contains no such exception from its requirement of a certificate. In fact, it flies squarely in the face of both the language and the purpose of Section 1 (18)-(20), that in the matter of the acquisition, construction, operation or abandonment of a line of railroad in interstate commerce the jurisdiction of the Interstate Commerce Commission is supreme and exclusive and a franchise from a state gives no authority to operate without a certificate from the Commission.

*R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331;
*Texas &c. R. R.* v. *Northside Ry.*, 276 U. S. 475;
*Transit Commission* v. *United States*, 289 U. S. 121;
*Long Island R. Co., Trackage*, 162 I. C. C. 218;
*Construction of Line by Jefferson Southwestern*, 86 I. C. C. 796.

In the *Transit Commission* case, this Court upheld the decision of the Commission in the *Long Island Railroad* case cited, in which the Commission determined that the fact that the Long Island was to operate as lessee pursuant to a contract which had been approved by the state did not eliminate the necessity for a certificate from the Interstate Commerce Commission.

Moreover, the theory of the Commission's decision here is inconsistent with its own decisions, including those previously cited, wherein it has held that one seeking to acquire railroad property by lease and begin operation thereof as a railroad, as well as a railroad which has operated leased property and seeks to abandon operation upon termination of its lease must secure a certificate from the Commission before beginning or ceasing operation, as the case may be.

*Livestock Terminal Service Co. Abandonment*, 257 I. C. C. 1;
*Duluth & I. R. R. Co. Control*, 224 I. C. C. 353;
*Norfolk S. R. Co. Receivers Abandonment*, 221 I. C. C. 258;
*Lehigh Valley R. Co. Abandonment of Operation*, 202 I. C. C. 659.

In the *Livestock Terminal* and *Lehigh Valley* cases the Commission held that the fact that the lessor refused to renew the lease except on terms unacceptable to the lessee did not permit the lessee to abandon operation without having obtained a certificate from the Commission authorizing it to do so.

In the *Duluth* case, the Commission, at page 356, said:

> "the lessee may not lawfully abandon operation of the leased lines without first having obtained from us a certificate under section 1(18) of the act."

If a lessee may not begin operation of a railroad or abandon operation without a certificate from the Commission, it certainly cannot be said that the lessee is operating as agent for the lessor and in fulfillment of the lessor's rights and franchise obligations. At least this is so for the purpose of Section 1(18)-(20) of the Interstate Commerce Act.

Finally, the Commission's decision does not excuse the action of the lower court here, because the court's order turns over to the Connecting Company not only property owned by it, which, on the Commission's assumption it was under a franchise obligation to operate, but also property of the Hoboken Land and Improvement Company which, so far as appears from the record, the Connecting Company never operated or was under any obligation to operate, and property owned by the debtor-lessee the right to which is in dispute. As to these several portions of the property which would be delivered to the Connecting Company under the court's order, even the Commission's reasoning affords no escape from the requirement of a certificate from the Commission as a condition precedent to operation.

The District Court in its opinion conditioned the granting of the motion to terminate the lease "upon production to the court of conclusive evidence that the requirement of the laws relating to the continuous operation of the railroad have been complied with" (R. 45). It is submitted that this condition has not been fulfilled and that, therefore, the order is contrary to the District Court's own opinion.

## POINT V.

**Order No. 39 should be reversed because it transfers to the lessor possession of certain railroad property owned by the debtor-lessee before determination of conflicting claims thereto.**

The order under review provides in part that:

> "3. Notwithstanding conflicting claims thereto, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, cash on hand, accounts receivable, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise." (R. 59).

The property of the debtor which the Trustee is directed to deliver to the Connecting Company includes land and tracks leading to the float bridge and a short portion at the end of the right of way with tracks and two sidings which are owned by the debtor. The Trustee and debtor maintain that these properties are not covered by the leases and that the Connecting Company has no right to them upon termination of the leases.

The Circuit Court of Appeals excuses this phase of the order on the ground that it is "a wise one for it permits the operation of this small trackage as part of the main

stem of the railroad" (R. 97). It is submitted, however, that until the submission of a plan of reorganization it was not within the authority of the court to dispose of property of the railroad merely because the court considered that such disposal would produce a desirable result from the standpoint of railroad operation. It is for the plan of reorganization to propose and the Commission to decide, subject to the ultimate approval of the court, what disposition of the properties of the railroad will conform to the requirements of Section 77 and the public interest. It is immaterial that the items of property in question were small. The railroad as a whole is a small railroad and tracks 265 feet in length and a track 20 feet in length, constituting the connecting link with a float bridge, which is its means of interchange with one of the principal trunk line railroads in New York harbor, are not insignificant in proportion to the railroad as a whole. They are as great, relatively, as would be many miles of track in relation to a transcontinental line.

## Conclusion.

***For the reasons set forth herein, it is submitted that Order No. 39 of the District Court was invalid; that the opinion of the District Court, upon which that order was based, and the opinion of the Circuit Court of Appeals affirming it were unsound and incorrect in law; and that the judgment below should be reversed and Order No. 39 should be cancelled and annulled.***

Respectfully submitted,

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Dated: December 3, 1945.

# APPENDIX.

## Controlling Statutes.

Section 77 of the Bankruptcy Act, U. S. C. Title 11, Section 205, 49 Stat. 911, is being printed in full in the brief for the Trustee and is therefore not reproduced here.

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Interstate Commerce Act, U. S. C. Title 49, Section 1, 49 Stat. 543.

Section 1 (18) provides:

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Section 1 (20) provides:

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to

issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

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# Supreme Court of the United States

**October Term, 1945**

**No. 384**

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, *et al.*,
*Petitioners,*

*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and HOBOKEN LAND AND IMPROVEMENT COMPANY,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

EDWARD J. O'MARA,
*Counsel for Respondents.*

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# Supreme Court of the United States

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FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, et al.,
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*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and HOBOKEN LAND AND IMPROVEMENT COMPANY,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

### Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but is printed page 116 of the record. The opinion of the District Court was reported in 56 Fed. Sup. 187 and is printed page 55 of the record.

### Statement of the Case.

Petitioners' statement of the case is such that it requires amplification.

On June 19, 1906, Hoboken Railroad, Warehouse and Steamship Connecting Company (hereinafter called Connecting Company) leased to the debtor a line of railroad, including all rights of way, roadbed, tracks, rails, ties,

freight-houses, terminals, yards, engine-houses, car and machine shops, rolling stock and other equipment, in the City of Hoboken, New Jersey, for a period of ninety-nine years. Article Third, paragraph (1), of the lease provides:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 84a).

The Fifth Article of the lease provided that upon the failure to observe, keep and perform the covenants and agreements thereof, after such default had continued for a space of thirty days after notice from the lessor thereof, the lessor might at its option by notice in writing terminate the lease and thereupon enter into and upon the demised premises and that the right, title and interest of the lessee should thereupon absolutely cease and terminate as though the lease had never been made (R. 93).

The rental reserved by the lease was the sum of several items as follows:

(1) A stated amount of $22,000.00 per year (later reduced to $21,500.00 per year)

(2) An amount per ton of freight transported over a certain amount, as specified in the lease, and referred to as "excess tonnage"

(3) All premiums of insurance upon the leased premises.

(4) All taxes upon the demised premises or upon the lessor by reason of its ownership thereof, and of the appurtenant franchises, or upon the rent reserved by the lease and which the lessee may be required to pay thereon or retain or deduct therefrom under any present or future law.

Up to the time of filing the petition for reorganization herein, the debtor had paid the lessor the base rental of $21,500.00 fixed by the lease and had reimbursed it for insurance premiums. It refused to pay Federal income and excess profits taxes levied against the lessor, and certain excess tonnage, claiming that such taxes and tonnage did not come within the terms of the lease (R. 17a). The lessor thereupon demanded arbitration under a clause of the lease providing therefor, and the arbitrators made an award against the debtor in the total amount claimed by the lessor, namely $24,102.43 (for the fiscal years beginning July 1, 1932 and ending June 30, 1939). The lessor thereupon commenced an action at law in the Hudson County Court of Common Pleas to recover the amount of the arbitrators' award, and the debtor filed a bill in the New Jersey Court of Chancery to restrain the prosecution of the action. The Chancery suit was determined adversely to the debtor, which thereupon appealed to the Court of Errors and Appeals. That court affirmed the Court of Chancery and on or about July 2, 1943, lessor entered judgment in its action at law in the Hudson County Court of Common Pleas against the debtor in the amount of $27,965.00. In the meantime,

and on or about March 31, 1943, the lessor instituted a second action at law in the Hudson County Court of Common Pleas for additional rental for the fiscal years ending June 30, 1940, 1941 and 1942 in the amount of $14,566.44 (R. 18a).

On July 26, 1943, a little more than three weeks after the entry of the aforesaid judgment, the debtor filed its petition for reorganization in the United States District Court for the District of New Jersey, alleging among other things that the financial condition of the debtor was seriously aggravated by the entry of the lessor's judgment for rent and the pending suit for additional rent (R. 16a, 17a, 18a). The petition also alleged that the debtor had no means of borrowing or otherwise procuring funds to meet its obligations, and that its cash reserves were wholly insufficient for its financial requirements including necessary working capital, and that therefore the debtor was without funds to continue to operate the railroad and property and maintain the same in condition and repair to render adequate service to the public and at the same time meet its debts (R. 21a). The court made an order approving the petition on the day it was filed. Thereafter, Forrest S. Smith was appointed trustee and after the approval of his appointment by the Interstate Commerce Commission, he duly qualified and entered upon the performance of his duties as such trustee on November 12, 1943. On February 14, 1944, the lessor moved for an order modifying the restraints imposed by Order No. 1 (approving the petition for reorganization) so as to permit the lessor to terminate the lease for breach of covenant (R. 40a). After oral argument on the motion, the court ordered briefs, and on August 4, 1944, handed down its opinion authorizing such termination (R. 55a). In the interim and on June 12, 1944, the court entered Order No. 27 (R. 51a) on the petition of the trustee (R. 48a), authorizing the trustee to adopt the

lease and other executory contracts, and pursuant thereto the trustee served notice upon the lessor that he had elected to adopt said lease (R. 52a).

The district court's opinion on the motion to terminate the lease granted the relief sought, to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad had been complied with (R. 59a). The lessor thereupon filed a petition with the Interstate Commerce Commission, setting forth the circumstances of the case, and praying for a determination by the Commission that the lessor did not require a certificate of convenience and necessity to resume operation of the railroad. The trustee, the debtor, and Seatrain Lines Inc. (the owner of all of the capital stock of the debtor) sought and obtained permission to intervene in said proceedings and filed briefs opposing the contention of the lessor. On December 2, 1944, the Interstate Commerce Commission filed its report, in which it found that the lessor did not require a certificate of convenience and necessity, and that it had not only the right but the duty to resume the operation of the railroad without such certificate (R. 66a et seq.). Thereafter, and on December 19, 1944, Order No. 39 (R. 76a) was entered in the District Court, authorizing the lessor to terminate the lease and enter into possession as of midnight, December 31, 1944, and on July 17, 1945, the said order was affirmed by the Circuit Court of Appeals for the Third Circuit.

## Summary of Argument.

Respondents respectfully submit that the petition for a writ of certiorari should be denied because:

1. The qualification of the trustee and his subsequent adoption of the lease breached the covenant against assignment and entitled the landlord to terminate the lease.

2. There is not here involved an important question of Federal Law which has not been but should be decided by this Court.

3. Order No. 39 should not be reversed because it transfers possession of certain railroad property, claimed by the trustee, to the lessor before determination of title thereto.

4. The District Court did not err in failing to require the landlord to obtain a certificate of convenience and necessity under Section I (18) of the Interstate Commerce Act or in requiring the trustee to discontinue operations without prior approval by the Interstate Commerce Commission authorizing such discontinuance.

## ARGUMENT.

### POINT I.

**The qualification of the trustee and his subsequent adoption of the lease breached the covenant against assignment and entitled the landlord to terminate the lease.**

Article Third, paragraph (1), of the lease provides:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in

any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 84a).

It will be seen that the lessor, by the broadest possible language, sought by this covenant to prevent any transfer of the lessee's rights or obligations under the lease without the consent of the lessor expressed by endorsement on the lease pursuant to a resolution of its board of directors. The covenant prohibited not only a voluntary transfer of the lessee's interests, but also any transfer made in any proceeding, whether at law or in equity or otherwise, to which the lessee was a party, whereby any of the rights, duties and obligations of the lessee should or might be transferred, encumbered, abrogated or in any manner altered. This contract was voluntarily assumed by both parties. The lease is a carefully drawn instrument covering thirty-two printed pages exclusive of the schedules. At the time of its execution, the lessor had acquired railroad operating rights, a charter from the State of New Jersey, and a franchise from the City of Hoboken enabling it to operate the railroad. It had constructed the railroad and had operated it for nine years, thereby establishing a going business. By this instrument it leased a fully equipped and going railroad to a lessee of its choice in the full knowledge that it as the owner was obligated to resume and perform the operation of the road at any time that its lessee defaulted or became unable to operate. Recognizing the possibility of the sudden reversion of the railroad to it at any time, the lessor in Article Third (b) of the lease (R. 82a) required the lessee to efficiently maintain and operate the

railroad and to enlarge and improve it in consonance with the growth of the district which it served and the increased traffic available to it. The lessee was required under the lease to keep the railway system of the lessor equipped with a sufficient number of engines, electric motors and cars, and with all the electrical and other power appliances that might be needed, "so that in case of the termination of this indenture at any time, the demised premises shall be adequately furnished and equipped to carry on business and continue its operations" (R. 83a).

The lessor, like any other landlord, had a property owner's right to select the tenant who would occupy and use, and who would be charged with the obligation of preserving, protecting and improving the leased property. It likewise had the right to insist that no other party should succeed to the lessee's rights and obligations without its consent. This right was far more important to it than it would be to the lessor of an ordinary piece of real estate. It was leasing a going railroad—a costly one-use property which might easily become a money losing proposition, with the consequent degeneration of its plant and equipment, if it were not well managed and if its freight traffic were not stimulated and elevated to a high level. It was charged with the public duty of operating the road in the event of the default or inability of the lessee to continue operation. It was of the utmost importance, therefore, that it should contract only with a lessee of its choice, and that the obligations assumed by the lessee should not be transferred to a third party without the lessor's consent. The lessor guarded against such transfer by the sweeping language employed in the covenant hereinabove set forth, and the lessee freely and willingly executed the lease with that covenant contained therein.

Appellants argue that an ordinary covenant against assignment is not breached by the bankruptcy of the lessee

and the consequent transfer of his interest to a trustee. We are in accord with that proposition. In *re Prudential Lithograph Company*, 265 Fed. 869; (D. C. S. D. N. Y.) in *re Levinson*, 295 Fed. 140 (D. C. W. D. Wash. N. D.). It is equally well established, however, that a clause specifically giving the lessor the right to terminate the lease upon the filing of a petition in bankruptcy by or against the lessee is enforceable. In *re Wil-low Cafeterias*, 95 F. (2d) 306 (C. C. A. 2nd Circuit).

In *Model Dairy Co.* v. *Foltis-Fischer Inc.* (C. C. A., 2nd Cir.) 67 F. (2d) 704, the court upheld a clause in the lease permitting the lessor to reenter on the tenant's insolvency, bankruptcy or receivership, saying at page 706:

> "It is true that courts do not look upon such conditions with a friendly eye, classing them as forfeitures. * * * Nevertheless they are valid, and we must give effect to the fair meaning of the language used. * * * The receiver, though not truly a tenant, is in possession and prevents him" (the lessor) "from disposing of the premises as he would. Unless the lease contains a condition against passage of title, he must suffer the term to be sold to one whom he may not desire."

In *Jandrew* v. *Bouche*, 29 F. (2d) 346 (C. C. A., 5th Cir.), the lease contained a stipulation against its assignment without the consent of the lessor, and, among other things, that the lessee "shall not permit or suffer any of the goods, * * * or other personal property which may be on the said premises at any time during the period of said lease to be seized under any legal process or to pass into the hands of any receiver or trustee in bankruptcy or other officer, and that this lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of the said lessees." The court held that the last quoted clause was one of conditional limi-

tation, *ipso facto* terminating the lease, without action by either party, with the adjudication in bankruptcy and the appointment of the trustee.

In *In re Georgalas Bros.*, 245 Fed. 129 (D. C., N. D. Ohio), the trustee in bankruptcy claimed the right to sell a lease which the lessor claimed was void. The lease contained a provision that "if the lessee shall be adjudged bankrupt; or shall make an assignment for the benefit of his creditors, or if this lease shall pass by transfer, operation of law, or otherwise from said lessee to any other party without the written consent of the lessor", the lessor may void the lease and reenter. The question before the court was whether the lease had passed "by operation of law or otherwise from said lessee to any other person without the written consent of the lessor." The court concluded that the lessor had the right to avoid the lease, saying, page 131:

> "It is not asserted that the lessor had consented, in writing or otherwise, to the transfer of this lease by operation of law to the trustee. The only right of the trustee to sell the lease is by virtue of the transfer thereof by operation of law to him. It is inconsistent to assert title in the trustee by operation of law, and yet to say that the title still remains in Theodore, and that the covenant is not broken. An adjudication in bankruptcy against a partnership, it is settled law in this circuit, operates to transfer by law to the trustee all the property and assets of the individual members of the partnership. * * * It is by virtue of this legal effect of an adjudication of the partnership to be bankrupt that the trustee acquires a right or title to this lease. It is equally effective to operate as a transfer by operation of law of the lease, so as to bring about a violation of this covenant.
>
> "It is also settled law that a lease may be so framed that a transfer by operation of law will avoid the same at the option of the lessor. *Gazlay* v. *Williams*, 210 U. S. 41; *In re Frazin*, 183 Fed. 28. The covenant

above quoted, when properly interpreted and understood, bring the facts within its terms, and the lessor's right to avoid the same is well established, and is sustained by the authorities above cited."

In *Empress Theatre Co.* v. *Horton*, 266 Fed. 657 (C. C. A., 8th Cir.), the court upheld a clause in a lease that "no right, title or interest upon this lease shall pass to any trustee in bankruptcy, or by judicial process, or by operation of law, without the consent" of the lessor, and that "the bankruptcy or insolvency" of the lessee shall at the option of the lessor work an immediate forfeiture of the lease. The court said, page 661:

> "* * * The basement leased was a valuable property. The purpose the lessor had in making the lease, to secure the operation in this basement of a high class cafe with special amusement features, made the solvency of the lessee and hence its continuous operation of the cafe essential to the accomplishment of this purpose. Its insolvency or bankruptcy, placing the basement in the hands of a trustee for a long time during bankruptcy proceedings, and then sending it to an unknown purchaser, would undoubtedly to a large extent defeat the object of the lessor in making the lease, produce the vacancy or inadequate operation of the proposed cafe, and result in immeasurable damage to the leased premises and to the value of their use. It was to prevent this contemplated possibility that these parties wrote into their lease the condition and covenant that in case of the insolvency or bankruptcy of the lessee, at the election of the lessor, the term of the lease should end and the leased premises should be returned to the lessor free from the lease."

Petitioners contend, however, that the covenant herein is not a covenant against bankruptcy, nor a covenant providing for termination if the lessee should file a petition

in reorganization and that since the covenant should be construed strictly against the lessor, there has been no breach which would entitle the lessor to terminate the lease.

In *Gazlay* v. *Williams*, 210 U. S. 41, the Supreme Court held that a general clause against assignment prohibits only a voluntary assignment on the part of the lessee, and is not violated by a transfer by operation of law. The court recognized, however, that a covenant against assignment by operation of law was valid and enforceable, and quoted with approval Jones on Landlord and Tenant, as follows (p. 47):

> "* * * Jones, in his work on Landlord and Tenant, lays it down (Section 466) that 'An ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law'."

The same distinction is recognized by the Chandler Act (Act of June 22, 1938, c. 575 Section 1, 52 Stat. 879; U. S. C. A. Title 11, Section 110, paragraph b), which provides:

> "* * * A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same, shall be enforceable * * *."

It may be conceded that the covenant here before the court is not literally a covenant against bankruptcy. It is, however, far broader than such a covenant. It gives

to the lessor the option to terminate the lease upon a sale or transfer, either by the voluntary act of the lessee or in any kind of legal proceeding to which the lessee is a party, whereby any of the rights, duties and obligations of the lessee shall or may be transferred, encumbered, abrogated or in any manner altered. The purpose of the clause cannot be open to doubt. It was the intention of the lessor to protect itself by the broadest possible language against the voluntary or involuntary transfer of the lessee's obligations under the lease to any other party, without the consent of the lessor. The word "unauthorized", as the context makes clear, relates to the lessor; and the clause operates to vest in the lessor an option to terminate the lease when the transfer of the lessee's interest is accomplished in any legal proceeding whatever, which was instituted without the previous consent of the lessor. The clause is in effect a prohibition against the transfer of the lessee's interest in the lease, either voluntarily or *by operation of law*. A transfer by operation of law is precisely what has happened in this proceeding.

By Order No. 5 herein appointing Forrest S. Smith trustee it was provided (Par. 6):

> "That following said ratification" (by the Interstate Commerce Commission) "and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this order be vested in the said Forrest S. Smith as trustee of the debtor's property." (R. 36a.)

This order was made pursuant to U. S. C. A. Title 11, Section 205, paragraph (c), subdivision (2), which provides:

> "* * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and con-

sistently with the provisions of this section, all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor."

Paragraph (1) of the same section provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 72 referred to in the above quotation is the section providing for the election of a trustee under the Bankruptcy Act. Consequently, by the very words of the statute the title which the trustee herein acquired by virtue of his trusteeship, is exactly the kind of title which a trustee in an ordinary bankruptcy acquires.

It is well settled that upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of the filing of the petition. *Isaacs, Trustee* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Gross* v. *Irving Trust Company*, 289 U. S. 342; *Irving Trust Company* v. *Perry*, 293 U. S. 307; *Taylor* v. *Sternberg*, 293 U. S. 470; *Armour & Company* v. *Callahan*, 25 F. (2d) 584 (C. C. A. 4th Cir.); *In re Levinson*, 295 Fed. 146 (D. C. Wash.).

It seems clear, therefore, that under the statute the title to the lessee's interest in the lease became vested in the trustee, if not upon his qulaification, certainly upon his adoption of the lease. *Palmer* v. *Palmer*, 104 F. (2d) 161 (C. C. A. 2nd Cir.). We therefore have an unauthorized transfer of the demised premises and of the rights and privileges of the lessee made in a proceeding "whether at law or in equity or otherwise" to which the lessee was a party, and by virtue of which the rights, duties and obligations of the lessee were transferred, abrogated and altered.

It is evident that the rights, duties and obligations of the lessee were transferred, abrogated and altered by the vesting of the title in the trustee. The lessee's obligation to pay the rental was transferred to the trustee. The duty imposed upon the lessee of operating the railroad was transferred to the trustee. Its obligation to maintain and improve the railroad and to keep it properly equipped, so that it could handle the expanded traffic in harmony with the growth of the community it served, passed from the lessee to the trustee. The duty imposed upon the lessee to stimulate the traffic of the railroad and to protect the lessor's operating rights likewise passed to the trustee. In fact, all of the rights the lessee acquired and all of the duties and obligations it assumed by virtue of the lease, passed from the lessee to the trustee, without the consent of the lessor. Thus the very situation which the lessor was careful to guard against by the inclusion of the covenant in the lease, was consummated.

In *Finn, Trustee* v. *Meighan*, 65 S. Ct. 1147, this court decided that a covenant in a lease terminating the tenancy if a petition in bankruptcy should be filed by the tenant, or if the tenant should be adjudged bankrupt or insolvent by any court, or if a trustee in bankruptcy of the tenant should be appointed in any suit or proceeding brought by or against the tenant, was breached upon the tenant's voluntary petition for reorganization under Chap-

ter X of the Bankruptcy Act and the approval of such petition by the court. This decision destroys the petitioners' argument that the purpose for which a trustee in reorganization acquires title to the debtor's assets differs from the purpose for which the trustee in an ordinary bankruptcy acquires title to the assets of the bankrupt, and that therefore the acquisition of title by a trustee in reorganization should not be considered a breach of a covenant against bankruptcy or, as in the case at bar, against the assignment of the tenant's interests in the leasehold in any proceeding at law, in equity or otherwise. Even if the law recognized the distinction for which petitioners contend, however, it would be utterly immaterial to this issue.

We are here concerned solely with the question of whether or not there was an unauthorized transfer of the lessee's rights, duties and obligations under the lease. The purpose of such transfer, the length of its duration, the possibility of a subsequent re-acquisition of the rights, duties and obligations by the lessee are entirely extraneous. The lessor used every precaution which care, prudence and ingenuity could suggest to prevent the transfer of the lessee's interest to any third party for any purpose whatever. The moment such a transfer took place, the lessor's substantial right to choose the one party to which it was willing to entrust the operation, maintenance and development of its property, which right the parties to this lease by their voluntary act agreed to protect, was violated. It is no answer to say that the violation might be cured in the indefinite future. It might or it might not be.

The duties and obligations of the lessee have been abrogated since July 26, 1943. The trustee has been operating the railroad since his qualification. One of the most important provisions of this lease is that in Article Third, by the terms of which the lessee is required not only to maintain the railroad, but to improve it so as to enable it to take

advantage of the increased business which the growth of the community would provide. Obviously, the lessor was entitled to the observance of this covenant by the lessee. It was undoubtedly one of the primary reasons why it was so careful to limit its contractual relationship to the lessee or to any substitute for the lessee which it should approve. It is equally obvious that the trustee could not, even if he desired to, perform the obligations of this covenant during the trusteeship. He could not be concerned with the long-range prospects of the railroad, as could a lessee under a lease which still had sixty years to run. His duty and his obligation is to preserve the assets as they exist, in the hope that a reorganization can be accomplished. That means that for all practical purposes he is operating on a day to day and hand-to-mouth basis. It is evident, therefore, that during the trusteeship the lessor has been and will be deprived of the perforamnce of the lessee's covenant to not merely operate the road but to improve the plant and expand its traffic.

To summarize, there has been a transfer of the lessee's interest in the lease in a legal proceeding to which it was a party, by virtue of which the rights, duties and obligations of the lessee passed to the trustee. The District Judge held that that transfer took place upon the qualification of the trustee (R. 59a). Even if this court should disagree with the court below on that point, it cannot be gainsaid that such a transfer certainly took place upon the trustee's adoption of the lease (*Palmer* v. *Palmer, supra*). The transfer took place without the consent of the lessor. We submit, therefore, that the covenant contained in Article Third (1) has been breached, and that the lessor is entitled to terminate the lease in accordance with the terms thereof.

## POINT II.

**There is not here involved an important question of Federal Law which has not been but should be decided by this Court.**

The sole question presented here is whether or not the particular covenant contained in this lease was violated by the qualification of the trustee and his adoption of the lease.

Petitioners contend that, even if the District Court was correct in holding that the Connecting Company had a legal right to terminate its lease, entry of the termination order before considering any reorganization plan was premature. This argument is based upon the distinction between the purpose of an ordinary bankruptcy and that of a railroad reorganization proceeding. Excerpts from cases such as *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, and *Van Schaick* v. *McCarthy*, 116 F. (2d) 987 (C. C. A. 10th), which deal with the general principle that Section 77 contemplates the adoption of a suitable plan of reorganization rather than a liquidation of assets, are cited, and heavy reliance is placed upon the case of *Continental Bank* v. *Chicago, Rock Island etc. Ruy.*, 294 U. S. 648, wherein this court sustained the issuance of an injunction restraining the holders of collateral notes of the debtor, secured by bonds issued by it and its subsidiaries, from selling any of the collateral pending the preparation and consummation of a plan of reorganization.

In the *Rock Island* case, the court held that it could not impair the enforcement of the noteholder's contract, but under the general equity powers of the court could by its injunctive power delay its enforcement, so as not to defeat the purpose of Section 77. The application for the injunction was addressed to the discretion of the court under

its general equity powers and this court held that an appellate court would not interfere with the exercise of the lower court's discretion in the absence of a showing that it had been improvidently exercised.

The distinction between the *Rock Island* case and the case at bar, however, is obvious. The Rock Island system comprised over 8,000 miles of line, running through many states of the Union. It operated many subsidiaries, had a complicated capital structure, and there was outstanding a great volume of securities held by many and widely separated creditors with varying rights. The court found that it would be practically impossible to prepare any plan of reorganization the important details of which could survive the changes in and the consequent fluctuation and disturbance of the financial structure brought about by recurring sales of collateral, and consequently issued the injunction prayed for. It was manifestly important in that case that a plan of reorganization be worked out, if possible, which would preserve the railroad system as a going concern.

In the case at bar, however, the preservation of the operation of the railroad is not endangered. The lease herein involved is for an entire switching railroad, involving approximately nine miles of main stem track. The debtor has no complicated financial structure. It has no outstanding bonds or secured indebtedness. All of its capital stock is owned by Seatrain Lines Inc. (R. 16a). The petition for reorganization was filed with only one end in view, namely the forcing of the Connecting Company to agree to a new lease on more favorable terms to the debtor. The filing of the petition followed closely upon the entry of judgment against the debtor for unpaid rent under the lease and the institution of a suit for additional rent thereunder. It is evident both from the petition itself (R. 17a) and from a petition of the trustee filed on January 20,

1944 (R. 94) that the principal, if not the only reason for the filing of the petition was the inability of the debtor to pay the rent under the lease. It is apparent, therefore, that the only plan of reorganization which could be submitted by the debtor would involve a new lease on different terms. To that the lessor will never agree, and the injunctive power of the court should not be exercised for the purpose of awaiting the futile gesture of a plan of reorganization which can never be consummated. In effect, the court below refused to exercise such power and under the holding in the *Rock Island* case its discretionary decision in this regard should not be disturbed. To grant to the lessor the right to terminate its lease will not interfere with the primary purpose of Section 77 in the slightest degree, since all or substantially all of the railroad reverts to the lessor, which will instantly resume operation.

## POINT III.

**Order No. 39 should not be reversed because it transfers possession of certain railroad property, claimed by the trustee, to the lessor before determination of title thereto.**

Petitioners complain that Order No. 39 should be reversed because it provides that all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes shall be delivered to the lessor, notwithstanding conflicting claims thereto, and that claimants might thereafter file a claim with the Clerk of the Court for the recovery of such property or its value and reasonable compensation for its use, which claims will thereupon be determined by the Court, through reference to a Master or otherwise.

This provision in the order was inserted at the suggestion of counsel for the trustee. It was an eminently prac-

tical suggestion, because the property in dispute, as is evident from the petitioners' brief, consists of two inconsequential lengths of track one about two hundred sixty-five feet in length, leading to a dead-end siding, and another about twenty feet long leading not to a float-bridge, as petitioners allege, but to a storage yard on land leased by debtor from the Delaware, Lackawanna and Western Railroad, which is of very little consequence in the operation of the railroad. The exclusion of either or both would not impair the lessor's ability to operate the railroad in the slightest degree. Of course, they were worthless to the trustee standing by themselves. Consequently the trustee through his counsel suggested the provision in the order of which petitioners now complain. The effect of the provision is to permit the continued operation of these small tracts in conjunction with the railroad, while the question of whether or not they revert to the lessor upon the termination of the lease is being determined by a Master. If it should be determined that they do not revert, the trustee under the terms of the order will be entitled to proper compensation for their use. If it is determined that they do revert as the respondents claim, no harm has come of the order.

It is not disputed that practically all of the railroad property reverts to the lessor on termination of the lease. The amount in dispute is less than one-tenth of one per cent of the property involved, and has no vital bearing upon the operation of the railroad. Even if the court were to permit the trustee to complain of a provision which he suggested, and should find that the court below had no technical right to include such a provision in the order, no basis would be formed for the reversal of the order. At most the order should be reformed by rescinding the provision complained of.

## POINT IV.

**The District Court did not err in failing to require the landlord to obtain a certificate of convenience and necessity under Section 1 (18) of the Interstate Commerce Act or in requiring the trustee to discontinue operation without prior approval by the Interstate Commerce Commission authorizing such discontinuance.**

The District Judge granted the motion to terminate the lease upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad had been complied with (R. 59a). In order to satisfy this requirement, the lessor filed an application with the Interstate Commerce Commission to resume the operation of the railroad and in effect asked the Commission to find that the provisions of Section 1 (18) of the Act, requiring a certificate of necessity and convenience before operation could be undertaken, did not apply, since the lessor was merely resuming operation of its own properties after temporary suspension during the existence of the lease. The petitioners herein sought and obtained leave to intervene in the proceedings before the Commission, and filed briefs. The Commission held that no certificate was required by the lessor, since its obligations and duties to the public have never ceased, but have merely been performed by the lessee during the term of the lease (R. 66a). The Commission therefore found that, independent of any certificate of necessity and convenience, the lessor had not only the right but the positive duty to resume the operation of the railroad, and in accordance with that finding, entered an appropriate order dismissing the respondent's application for a certificate (R. 75a).

Petitioners did not seek a review of the order of the Interstate Commerce Commission, but attempt to attack it

collaterally herein. It is respectfully submitted that they will not be heard to do so. The purpose of the District Judge was to assure the continuous operation of the Railroad. From the time of the institution of the proceedings to terminate the lease, the landlord has always recognized and now recognizes its obligation to take over such operation. Petitioners objected before the District Court that it would not be legally possible for the landlord to do so without securing from the Interstate Commerce Commission a Certificate of Convenience and Necessity. Out of a super-abundance of caution, the District Judge withheld the entry of the order terminating the lease for many months until the Interstate Commerce Commission should pass upon whether or not such a certificate was necessary. The decision of the Interstate Commerce Commission that it was not was reached after a full consideration of the matter, in which the petitioner sought and obtained the right to intervene and to file briefs.

It is not the petitioners' function to protect whatever public interest is involved in this matter. That is a matter solely between the Interstate Commerce Commission and the landlord. The landlord is ready, able and willing to resume the operation of the Railroad at a moment's notice. If the Interstate Commerce Commission was wrong in holding that no Certificate of Convenience and Necessity is necessary, it will have ample opportunity to correct the error.

## CONCLUSION.

***It is respectfully submitted that for the foregoing reasons the petition for a Writ of Certiorari should be denied.***

Respectfully submitted,

EDWARD J. O'MARA,
*Counsel for Respondents.*

IN THE

# Supreme Court of the United States

**October Term, 1945**

**No. 384**

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, SEATRAIN LINES, INC., and HOBOKEN MANUFACTURERS RAILROAD COMPANY,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and HOBOKEN LAND AND IMPROVEMENT COMPANY;

*Respondents.*

## BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.


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IN THE

# Supreme Court of the United States

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**No. 384**

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FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, SEATRAIN LINES, INC., and HOBOKEN MANUFACTURERS RAILROAD COMPANY,

*Petitioners,*

*vs.*

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and HOBOKEN LAND AND IMPROVEMENT COMPANY,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## BRIEF FOR RESPONDENTS.

### Reference to the Opinions Delivered in the Courts Below.

The opinion of the District Court of the United States for the District of New Jersey, rendered on August 4, 1944, is reported in 56 F. Supp. 187; also reproduced in this record (R. 42).

The opinion of the Circuit Court of Appeals for the Third Circuit, rendered on July 17, 1945, is reported in 150 Fed. (2d) 921; also reproduced in this record (R. 94).

## Statement of the Case.

Petitioners' statement of the case is such that it requires amplification.

The Hoboken Land and Improvement Company, one of the respondents, owns a majority of the capital stock of the Hoboken Railroad Warehouse and Steamship Connecting Company, the other respondent, which is herein referred to as the lessor, the owner-lessor, and the Connecting Company. The Connecting Company is the owner of the railroad property which is the subject of this controversy. The property is located on the Hudson River water-front in New Jersey, more than 95% thereof being in the City of Hoboken in that State. Neither of the respondents owns any of the securities of the Hoboken Manufacturers Railroad Company, the debtor and the lessee of the railroad property, and they have no pecuniary interest in that company. They are creditors in the reorganization proceeding.

On June 19, 1906, the Connecting Company leased to the debtor a line of railroad, including all rights of way, roadbed, tracks, rails, ties, freight-houses, terminals, yards, engine-houses, car and machine shops, rolling stock and other equipment, in the City of Hoboken, New Jersey, for a period of ninety-nine years. The lease contained a provision (Article Third (1)), against the sale, assignment or transfer thereof, or the underletting of the demised premises or any part thereof, without the previous consent of the lessor endorsed upon the lease. It provided that the covenant against such sale, assignment or transfer should apply to any unauthorized sale or transfer, whether made by the lessee "or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abro-

gated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 64-65). The Fifth Article of the lease provided that upon the failure to observe, keep and perform the covenants and agreements thereof, after such default had continued for a space of thirty days after notice from the lessor thereof, the lessor might at its option by notice in writing terminate the lease and thereupon enter into and upon the demised premises and that the right, title and interest of the lessee should thereupon absolutely cease and terminate as though the lease had never been made (R. 71).

The rental reserved by the lease was the sum of several items as follows (R. 11-12):

(1) A stated amount of $22,000.00 per year (later reduced to $21,500.00 per year)

(2) An amount per ton of freight transported over a certain amount, as specified in the lease, and referred to as "excess tonnage"

(3) All premiums of insurance upon the leased premises

(4) All taxes upon the demised premises or upon the lessor by reason of its ownership thereof and of the appurtenant franchises, or upon the rent reserved by the lease and which the lessee may be required to pay thereon or retain or deduct therefrom under any present or future law.

Petitioners are in error in referring to this lease and agreement as being a lease only of the "main-stem" or part of the railroad. Upon reference to Article Third of the lease, it will appear very clearly that this indenture conveyed an entire fully equipped switching railroad, having an established or going business or freight traffic, to the

lessee, and contemplated that the same fully equipped and going plant with the additions and betterments made during the term of the lease should revert to the lessor upon expiration or earlier termination of the lease (R. 63-68).

The owner-lessor constructed and equipped this railroad and later initiated its operation on September 7, 1897 (R. 50). It operated the railroad from September 7, 1897 to June 19, 1906, the date of the lease (R. 50-51), thereby creating a going business. It obtained the operating rights for the railroad—a charter from the State of New Jersey on September 17, 1895, and a franchise from the City of Hoboken on October 23, 1895 (R. 50). By the lease it delegated these operating rights to the lessee. So the question here is whether an entire equipped and going switching railroad, including its operating rights, shall or shall not revert to its owner for operation by the owner.

Up to the time of filing the petition for reorganization herein, the debtor had paid the lessor the base rental of $21,500.00 fixed by the lease and had reimbursed it for insurance premiums. It refused to pay Federal income and excess profits taxes levied against the lessor, and certain excess tonnage, claiming that such taxes and tonnage did not come within the terms of the lease (R. 11-14). The lessor thereupon demanded arbitration under a clause of the lease providing therefor, and the arbitrators made an award against the lessee in the total amount claimed by the lessor, namely $24,102.43 (for the fiscal years beginning July 1, 1932 and ending June 30, 1939). The lessor thereafter commenced an action at law in the Hudson County Court of Common Pleas to recover the amount of the arbitrators' award, and the debtor filed a bill in the New Jersey Court of Chancery to restrain the prosecution of the action. The Chancery suit was determined adversely to the lessee, which thereupon appealed to the Court of

Errors and Appeals. That court affirmed the Court of Chancery and on or about July 2, 1943, lessor entered judgment in its action at law in the Hudson County Court of Common Pleas against the lessee in the amount of $27,965.00. In the meantime, and on or about March 31, 1943, the lessor instituted a second action at law in the Hudson County Court of Common Pleas for additional rental for the fiscal years ending June 30, 1940, 1941 and 1942 in the amount of $14,566.44 (R. 13).

On July 26, 1943, a little more than three weeks after the entry of the aforesaid judgment, the lessee filed its petition for reorganization in the United States District Court for the District of New Jersey, alleging among other things that the financial condition of the debtor was seriously aggravated by the entry of the lessor's judgment for rent and the pending suit for additional rent (R. 10-16). The petition also alleged that the lessee had no means of borrowing or otherwise procuring funds to meet its obligations, that its cash reserves were wholly insufficient for its financial requirements including necessary working capital, and that therefore it was without funds to continue to operate the railroad and property and maintain the same in condition and repair to render adequate service to the public and at the same time meet its debts (R. 15). The court made an order approving the petition on the day it was filed. Thereafter, Forrest S. Smith was appointed trustee and after the approval of his appointment by the Interstate Commerce Commission, he duly qualified and entered upon the performance of his duties as such trustee on November 12, 1943. On February 14, 1944, the lessor moved for an order modifying the restraints imposed by Order No. 1 (approving the petition for reorganization) so as to permit it to terminate the lease for breach of covenant (R. 30). After oral argument on the motion, the court ordered briefs, and on August 4,

1944, handed down its opinion authorizing such termination (R. 42-45). In the interim and on June 12, 1944, the court entered Order No. 27 (R. 38) on the petition of the trustee (R. 36), authorizing the trustee to adopt the lease and other executory contracts, and pursuant thereto the trustee served notice upon the lessor that he had elected to adopt said lease (R. 39).

In granting the motion to terminate the lease the court ruled that the right to terminate should become effective upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad had been complied with (R. 45). The lessor thereupon filed a petition with the Interstate Commerce Commission, setting forth the circumstances of the case, and praying for a determination by the Commission that the lessor did not require a certificate of convenience and necessity to resume operation of the railroad. The trustee, the debtor, and Seatrain Lines Inc. (the owner of all of the capital stock of the debtor) sought and obtained permission to intervene in said proceedings and filed briefs opposing the contention of the lessor. On December 2, 1944, the Interstate Commerce Commission filed its report, in which it found that the lessor did not require a certificate of convenience and necessity, and that it had not only the right but the duty to resume the operation of the railroad without such certificate (R. 50-58). Thereafter, and on December 19, 1944, Order No. 39 (R. 58-62), was entered in the District Court, authorizing the lessor to terminate the lease and enter into possession as of midnight, December 31, 1944, and on July 17, 1945 this order was affirmed by the Circuit Court of Appeals for the Third Circuit.

The debtor, asserts that it has title to property of considerable value which will not revert to the lessor under the

terms of the lease. This is denied by the lessor. The District Court, in its Order 39, provided for the adjudication of this dispute through reference to a Master or otherwise (R. 59).

## Summary of Argument.

The qualification of the trustee and his subsequent adoption of the lease consummated a breach of the covenant against transfer and assignment, and entitled the landlord to terminate the lease and agreement and repossess its property.

That part of Article Third (1) of the lease which expressly forbids the unauthorized transfer of the demised premises from the lessee in any proceeding in law or equity or otherwise, to which the lessee may be a party, is an enforceable express covenant, as distinguished from the customary general covenant, which prohibits transfer of the demised premises from the lessee to the trustee.

Although a general covenant or condition in a lease against voluntary assignments may not preclude transfer of the demised premises from a lessee to a trustee in a reorganization proceeding the lessor and lessee may, and in the case at bar they did, draft a strong special covenant that will effectually bar such transfer. *Gazlay* v. *Williams*, 210 U. S. 41; *In re Wil-low Cafeterias*, (C. C. A. 2d Cir.) 95 Fed. (2d) 306; *Model Dairy Co.* v. *Foltis-Fischer Inc.*, (C. C. A. 2nd Cir.) 67 Fed. (2d) 704; *Jandrew* v. *Bouche*, (C. C. A. 5th Cir.) 29 Fed. (2d) 346; *In re Georgalas Bros.*, 245 Fed. 129; *Empress Theatre Co.* v. *Hortons*, (C. C. A. 8th Cir.) 266 Fed. 657.

The Chandler Act (Act of June 22, 1938, C 575, Section 1, 52 Stat. 879, U. S. C. Title 11, Section 110, paragraph b) provided in substance that a general covenant against assignment in a lease shall not bar transfers to trus-

tees, but that an express covenant in a lease against assignments by operation of law or the bankruptcy of a specified party shall be enforceable, and Congress has made the provisions of this section applicable to proceedings under Section 77.

The covenant against transfer contained in the lease here before the court is enforceable. It is not against public policy and does not contravene the purposes of Section 77 of the Bankruptcy Act. This is a lease of an entire railroad and an entire railroad will revert to the lessor, which is ready, able and willing to assume the full operation thereof without any interruption whatever. Nor is there any reason to postpone the lessor's right of re-entry until the formulation of a plan of reorganization. Such an application is addressed to the sound discretion of the court under its general equity powers, and has been rejected by both the District Court and the Circuit Court of Appeals in this case. The concurrent findings of the two courts should be accepted as conclusive by this court.

No question of public interest is involved in this case and no discontinuance or interruption of the operation of the railroad has been threatened or contemplated. The Interstate Commerce Commission has ruled that upon re-entry, the lessor will be under a duty to operate the railroad, and that no certificate of public convenience and necessity is required under Section 1 (18) of the Interstate Commerce Act.

This court should sustain the decision of the Circuit Court of Appeals, Third Circuit, and the decision of the District Court, District of New Jersey.

# ARGUMENT.

## POINT I.

**The qualification of the trustee and his subsequent adoption of the lease breached the covenant against assignment and entitled the landlord to terminate the lease.**

### A. Provisions of the lease.

Article Third, paragraph (l), of the lease provides:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding; whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 64).

It will be seen that the lessor, by the broadest possible language, sought by this covenant to prevent any transfer of the lessee's rights or obligations under the lease without the consent of the lessor expressed by endorsement on the lease pursuant to a resolution of its board of directors. The covenant prohibited not only a voluntary transfer of the

lessee's interests, but also any transfer made in any proceeding, whether at law or in equity or otherwise, to which the lessee was a party, whereby any of the rights, duties and obligations of the lessee should or might be transferred, encumbered, abrogated or in any manner altered. This contract was voluntarily assumed by both parties. The lease is a carefully drawn instrument covering thirty-two printed pages exclusive of the schedules. At the time of its execution, the lessor had acquired railroad operating rights, a charter from the State of New Jersey, and a franchise from the City of Hoboken enabling it to operate the railroad. It had constructed the railroad and had operated it for nine years, thereby establishing a going business. By this instrument it leased a fully equipped and going railroad to a lessee of its choice in the full knowledge that it as the owner was obligated to resume and perform the operation of the road at any time that its lessee defaulted or became unable to operate. Recognizing the possibility of the sudden reversion of the railroad to it at any time, the lessor in Article Third (b) of the lease (R. 63) required the lessee to efficiently maintain and operate the railroad and to enlarge and improve it in consonance with the growth of the district which it served and the increased traffic available to it. The lessee was required under the lease to keep the railway system of the lessor equipped with a sufficient number of engines, electric motors and cars, and with all the electrical and other power appliances that might be needed, "so that in case of the termination of this indenture at any time, the demised premises shall be adequately furnished and equipped to carry on business and continue its operations" (R. 64).

The lessor, like any other landlord, had a property owner's right to select the tenant who would occupy and use, and who would be charged with the obligation of preserv-

ing, protecting and improving the leased property. It likewise had the right to insist that no other party should succeed to the lessee's rights and obligations without the lessor's consent. This right was far more important to it than it would be to the lessor of an ordinary piece of real estate. It was leasing a going railroad—a costly one-use property which might easily become a money losing proposition, with the consequent degeneration of its plant and equipment, if it were not well managed and if its freight traffic were not stimulated and elevated to a high level. It was charged with the public duty of operating the road in the event of the default or inability of the lessee to continue operation. It was of the utmost importance, therefore, that it should contract only with a lessee of its choice, and that the obligations assumed by the lessee should not be transferred to a third party without the lessor's consent. The lessor guarded against such transfer by the sweeping language employed in the covenant hereinabove set forth, and the lessee freely and willingly executed the lease with that covenant contained therein.

Appellants argue that an ordinary covenant against assignment is not breached by the bankruptcy of the lessee and the consequent transfer of his interest to a trustee. We are in accord with that proposition. In *re Prudential Lithograph Company*, 265 Fed. 869; (D. C. S. D. N. Y.); In *re Levinson*, 295 Fed. 146 (D. C. W. D. Wash. N. D.). It is equally well established, however, that a clause specifically giving the lessor the right to terminate the lease upon the filing of a petition in bankruptcy by or against the lessee is enforceable. In *re Wil-low Cafeterias*, 95 F. (2d) 306 (C. C. A. 2nd Circuit).

In *Model Dairy Co.* v. *Foltis-Fischer Inc.* (C. C. A., 2nd Cir.) 67 F. (2d) 704, the court upheld a clause in the lease permitting the lessor to reenter on the tenant's insolvency, bankruptcy or receivership, saying at page 706:

"It is true that courts do not look upon such conditions with a friendly eye, classing them as forfeitures. * * * Nevertheless they are valid, and we must give effect to the fair meaning of the language used. * * * The receiver, though not truly a tenant, is in possession and prevents him" (the lessor) "from disposing of the premises as he would. Unless the lease contains a condition against passage of title, he must suffer the term to be sold to one whom he may not desire."

In *Jandrew* v. *Bouche*, 29 F. (2d) 346 (C. C. A., 5th Cir.), the lease contained a stipulation against its assignment without the consent of the lessor, and, among other things, that the lessee "shall not permit or suffer any of the goods, * * * or other personal property which may be on the said premises at any time during the period of said lease to be seized under any legal process or to pass into the hands of any receiver or trustee in bankruptcy or other officer, and that this lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of the said lessees." The court held that the last quoted clause was one of conditional limitation *ipso facto* terminating the lease without action by either party upon adjudication in bankruptcy and the appointment of the trustee.

In *In re Georgalas Bros.*, 245 Fed. 129 (D. C., N. D. Ohio), the trustee in bankruptcy claimed the right to sell a lease which the lessor claimed was void. The lease contained a provision that "if the lessee shall be adjudged bankrupt; or shall make an assignment for the benefit of his creditors, or if this lease shall pass by transfer, operation of law, or otherwise from said lessee to any other party without the written consent of the lessor", the lessor may void the lease and reenter. The question before the court was whether the lease had passed "by operation of law or otherwise from said lessee to any other person without the

written consent of the lessor." The court concluded that the lessor had the right to avoid the lease, saying, page 131:

> "It is not asserted that the lessor had consented, in writing or otherwise, to the transfer of this lease by operation of law to the trustee. The only right of the trustee to sell the lease is by virtue of the transfer thereof by operation of law to him. It is inconsistent to assert title in the trustee by operation of law, and yet to say that the title still remains in Theodore, and that the covenant is not broken. An adjudication in bankruptcy against a partnership, it is settled law in this circuit, operates to transfer by law to the trustee all the property and assets of the individual members of the partnership. * * * It is by virtue of this legal effect of an adjudication of the partnership to be bankrupt that the trustee acquires a right or title to this lease. It is equally effective to operate as a transfer by operation of law of the lease, so as to bring about a violation of this covenant.
>
> "It is also settled law that a lease may be so framed that a transfer by operation of law will avoid the same at the option of the lessor. *Gazlay* v. *Williams*, 210 U. S. 41; *In re Frazin*, 183 Fed. 28. The covenants above quoted, when properly interpreted and understood, bring the facts within its terms, and the lessor's right to avoid the same is well established, and is sustained by the authorities above cited."

In *Empress Theatre Co.* v. *Horton*, 266 Fed. 657 (C. C. A., 8th Cir.), the court upheld a clause in a lease that "no right, title or interest upon this lease shall pass to any trustee in bankruptcy, or by judicial process, or by operation of law, without the consent" of the lessor, and that "the bankruptcy or insolvency" of the lessee shall at the option of the lessor work an immediate forfeiture of the lease. The court said, page 661:

> "* * * The basement leased was a valuable property. The purpose the lessor had in making the

lease, to secure the operation in this basement of a high class cafe with special amusement features, made the solvency of the lessee and hence its continuous operation of the cafe essential to the accomplishment of this purpose. Its insolvency or bankruptcy, placing the basement in the hands of a trustee for a long time during bankruptcy proceedings, and then sending it to an unknown purchaser, would undoubtedly to a large extent defeat the object of the lessor in making the lease, produce the vacancy or inadequate operation of the proposed cafe, and result in immeasurable damage to the leased premises and to the value of their use. It was to prevent this contemplated possibility that these parties wrote into their lease the condition and covenant that in case of the insolvency or bankruptcy of the lessee, at the election of the lessor, the term of the lease should end and the leased premises should be returned to the lessor free from the lease."

Petitioners contend, however, that the covenant herein is not a covenant against bankruptcy, nor a covenant providing for termination if the lessee should file a petition in reorganization, and that since the covenant should be construed strictly against the lessor, there has been no breach which would entitle the lessor to terminate the lease.

In *Gazlay* v. *Williams*, 210 U. S. 41, the Supreme Court held that a general clause against assignment prohibits only a voluntary assignment on the part of the lessee, and is not violated by a transfer by operation of law. The court recognized, however, that a covenant against assignment by operation of law was valid and enforceable, and quoted with approval Jones on Landlord and Tenant, as follows (p. 47):

"• • • Jones, in his work on Landlord and Tenant, lays it down (Section 466) that 'An ordinary covenant against subletting and assignment is not broken

by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law'."

Sec. 70(b) of the Bankruptcy Act as amended, 11 U. S. C. A. Sec 110(b), which this court in *Finn* v. *Meighan*, 65 S. Ct. 1147, held was merely declaratory of the law as it then existed provides:

> "* * * A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that *an assignment by operation of law* or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same, shall be enforceable * * *." (Italics added.)

The covenant in the lease before the court is far broader than a covenant against bankruptcy. It gives to the lessor the option to terminate the lease upon an unauthorized sale or transfer, either by the voluntary act of the lessee or in any kind of legal proceeding to which the lessee is a party, whereby any of the rights, duties and obligations of the lessee shall or may be transferred, encumbered, abrogated or in any manner altered. The purpose of the clause cannot be open to doubt. It was the intention of the lessor to protect itself by the broadest possible language against the voluntary or involuntary transfer of the lessee's obligations under the lease to any other party, without the consent of the lessor. The word "unauthorized", as the context makes clear, relates to the lessor, and the clause operates to vest in the lessor an option to terminate the lease when the transfer of the lessee's interest is accom-

plished in any legal proceeding whatever, which was instituted without the previous consent of the lessor. The clause is in effect a prohibition against the transfer of the lessee's interest in the lease, either voluntarily or *by operation of law.*

**B. Transfer of lessee's interest to trustee.**

An examination of the language of Sec. 77 makes it clear that a transfer of the lessee's interest by operation of law is precisely what has happened in this proceeding. By Order No. 5 herein appointing Forrest S. Smith trustee it was provided (Par. 6):

> "That following said ratification" (by the Interstate Commerce Commission) "and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this order be vested in the said Forrest S. Smith as trustee of the debtor's property." (R. 28.)

This order was made pursuant to Sec. 77, (U. S. C. A. Title 11, Section 205, paragraph (c), subdivision (2)), which provides:

> "* * * The trustee or trustees so appointed, upon filing such bond, shall have *all the title* and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers *of a trustee appointed pursuant to Section 72* or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor." (Italics added.)

Section 72 referred to in the above quotation is the section providing for the election of a trustee under the Bankruptcy Act. Consequently, by the very words of the statute the title which the trustee herein acquired by virtue of his trusteeship, is exactly the kind of title which a trustee in an ordinary bankruptcy acquires.

It is well settled that upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of the filing of the petition. Sec. 70 of the Bankruptcy Act, U. S. C. A. Title 11, Sec. 110(a); *Isaacs, Trustee* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Gross* v. *Irving Trust Company*, 289 U. S. 342; *Irving Trust Company* v. *Perry*, 293 U. S. 307; *Taylor* v. *Sternberg*, 293 U. S. 470; *Armour & Company* v. *Callahan*, 25 F. (2d) 584 (C. C. A. 4th Cir.); *In re Levinson*, 295 Fed. 146 (D. C. Wash.).

Paragraph (l) of Section 77 of the Bankruptcy Act, U. S. C. A. Title 11, Sec. 205, par. (l), provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the *rights* and liabilities of creditors, and of *all persons with respect to the debtor and its property*, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed." (Italics added.)

It is not open to doubt that if the lessee were an ordinary mercantile corporation the covenant *sub judice* would have been breached if a voluntary petition for adjudication had been filed, and a decree of adjudication had been entered. By the very words of the statute the rights of all persons, including of course the lessor, with respect to the debtor and its property are exactly the same as if a voluntary petition for adjudication had been filed and decree of adjudication entered in an ordinary bankruptcy proceeding.

It is urged by the petitioners that since the purpose of the reorganization under Section 77 differs from that of an ordinary bankruptcy, a covenant against transfer of title by operation of law should not be deemed breached upon the filing of a petition under Section 77. A similar contention, with regard to reorganization proceedings under Chapter X, was rejected by this court in the case of *Finn, Trustee* v. *Meighan*, 65 S. Ct. 1147. In that case, the court held that Congress had made the provisions of Section 70 providing for the enforcement of an express covenant against assignment by operation of law or the bankruptcy of a specified party applicable to reorganization proceedings under Chapter X. With equal clarity, Congress had made the provisions of Section 70 applicable to reorganization proceedings under Section 77. As was pointed out above, Section 77 in terms provides that a trustee appointed thereunder shall have all of the title * * * of a trustee appointed under Section 72 or any other section of the title. Section 72 is the section providing for the election of a trustee in ordinary bankruptcy proceedings, and Section 70 deals with the title which such trustee acquires. It is perfectly obvious, therefore, that the provisions of Section 70 are applicable to reorganization proceedings under Section 77, just as they are applicable to reorganization proceedings under Chapter X, and that upon the basis of the decision of this court in *Finn* v. *Meighan, supra*, a covenant against assignment by operation of law is breached by proceedings under Section 77.

It seems clear, therefore, that under the statute and the decision of this court the title to the lessee's interest in the lease became vested in the trustee, if not upon his qualification, certainly upon his adoption of the lease. *Palmer* v. *Palmer*, 104 F. (2d) 161 (C. C. A. 2nd Cir.). We therefore have an unauthorized transfer of the demised premises and of the rights and privileges of the lessee made in a pro-

ceeding "whether at law or in equity or otherwise" to which the lessee was a party, and by virtue of which the rights, duties and obligations of the lessee were transferred, abrogated and altered.

It is evident that the rights, duties and obligations of the lessee were transferred, abrogated and altered by the vesting of the title in the trustee. The lessee's obligation to pay the rental was transferred to the trustee. The duty imposed upon the lessee of operating the railroad was transferred to the trustee. Its obligation to maintain and improve the railroad and to keep it properly equipped, so that it could handle the expanded traffic in harmony with the growth of the community it served, passed from the lessee to the trustee. The duty imposed upon the lessee to stimulate the traffic of the railroad and to protect the lessor's operating rights likewise passed to the trustee. In fact, all of the rights the lessee acquired and all of the duties and obligations it assumed by virtue of the lease, passed from the lessee to the trustee, without the consent of the lessor. Thus the very situation which the lessor was careful to guard against by the inclusion of the covenant in the lease, was consummated.

To summarize, there has been an unauthorized transfer of the lessee's interest in the lease in a legal proceeding to which it was a party, by virtue of which the rights, duties and obligations of the lessee passed to the trustee. The District Judge held that that transfer took place upon the qualification of the trustee (R. 41). Ever if this court should disagree with the court below on that point, it cannot be gainsaid that such a transfer verainly took place upon the trustee's adoption of the lease (*Palmer* v. *Palmer*, *supra*). The transfer took place without the consent of the lessor. We submit, therefore, that the covenant contained in Article Third (l) has been breached, and that the lessor is entitled to terminate the lease in accordance with the terms thereof.

## POINT II.

**The covenant against transfer is enforceable; it is not contrary to the Bankruptcy Act or to public policy.**

Petitioners contend that the purpose of Section 77 is different from that of an ordinary bankruptcy; that no distribution of the assets of the debtor is contemplated, but only a holding off of the debtor's creditors until such time as a reorganization can be accomplished. They further contend that the difference between the two procedures grows from the interest which the public has in the continued operation of a railroad, and quote Mr. Justice SUTHERLAND in *Continental Illinois National Bank and Trust Company* v. *Chicago Rock Island Pacific Ruy. Co.*, 294 U. S. 648, at 671 that:

> "A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.'"

Petitioners seek to draw from the admitted difference between a railroad reorganization proceeding and an ordinary bankruptcy proceeding the conclusion that the enforcement of a covenant against transfer, such as is contained in the lease here in question, would defeat the purpose of Section 77 and be against public policy. It is submitted that no such conclusion is warranted. A reorganization proceeding under Chapter X likewise differs from an ordinary proceeding in bankruptcy. The primary purpose of a Chapter X reorganization is not the distribu-

tion of the debtor's assets among its creditors, but a holding off of the creditors until a plan of reorganization can be effectuated. With regard to the protection of the private interests involved, the primary purpose of a Chapter X reorganization proceeding is identical with a proceeding for the reorganization of a railroad under Section 77. It is only where the primary purpose of Chapter X cannot be accomplished that the proceeding may be turned into an ordinary bankruptcy and the debtor's assets distributed among its creditors.

As has been pointed out above, this court has held that a covenant against assignment by operation of law or the bankruptcy of a specified party is enforceable in a Chapter X proceeding, just as it is in an ordinary bankruptcy. *Finn, Trustee* v. *Meighan, supra.*

The only essential difference between a reorganization under Chapter X and a railroad reorganization under Section 77 is that the public has an interest in the continued operation of the railroad. That interest is not in jeopardy in this case. The District Court was careful to see that the continued operation of the railroad was assured. It refused to enter the order terminating the lease until proceedings were had before the Interstate Commerce Commission, establishing the lessor's right to take up the operation of the road. In those proceedings, the Commission held that the lessor not only had the right but the obligation to do so, and that no certificate of public convenience and necessity was required from the Commission because the lessor's obligations and duties to the public had never ceased, but had merely been performed by the lessee for its (the lessor's) benefit during the term of the lease (R. 56-57). The landlord has always recognized and now recognizes its obligation to step in and operate the railroad.

Petitioners argue that *Continental Bank* v. *Chicago Rock Island, etc. Rwy.*, 294 U. S. 648, supports in principle

their contention that covenants such as that contained in the lease before the court cannot be enforced in a proceeding under Section 77. Not only does that case not support such a contention, but, we respectfully submit, it leads to the inevitable conclusion that such covenants are perfectly valid, but that in a proper case a court may, under its general equity powers, temporarily enjoin their enforcement.

In the *Rock Island* case, a petition was filed for the reorganization of the Chicago Rock Island and Pacific Railway Co. The railroad system involved comprised over eight thousand miles of line, running through many states of the Union. It operated numerous subsidiary companies, had a complicated capital structure and there was outstanding a great volume of securities held by many and widely separated creditors with varying rights. It had outstanding collateral notes, secured by mortgage bonds, part of which were issued by it and part by corporations forming a part of the system. Upon default on the notes, the holders were entitled to sell the security pledged therefor. The debtor filed a petition setting forth its default on the interest due on some of the mortgage bonds and the imminent default on others, and prayed that the court determine whether in the event of default it should enjoin the holders of the collateral notes from selling any of the collateral. The District Court found that it was necessary for the enforcement of Section 77 that the holders of the notes be enjoined and restrained from selling or disposing of the collateral pending the preparation and consummation of a plan of reorganization, because an immediate sale thereof would seriously embarrass and probably prevent the formulation of any plan. The Circuit Court of Appeals affirmed the order. This court held that the concurrent findings of the two courts should be accepted as conclusive, unless clearly erroneous. This court was careful to point out, moreover, that

the injunction in no way impaired the lien or disturbed the preferred rank of the pledgees (as indeed it could not under Section 67 (d), but did no more than suspend the enforcement of the lien by a sale of the collateral, pending further action.

The *Rock Island* case, therefore, cannot be cited as authority for the proposition that a covenant against transfer is unenforceable in a reorganization proceeding under Section 77. At most, it stands for the proposition that in a proper case and upon a showing that the immediate enforcement of the right would endanger the continued operation of the railroad, a court in the exercise of its proper equity power might suspend temporarily the enforcement of the right of re-entry.

The distinction between the facts in the *Rock Island* case and those in the case at bar is obvious. The lease herein involved is for an entire switching railroad, comprising approximately nine miles of main stem track. It would not be dismembered by the re-entry of the lessor, which would take up the operation of the railroad immediately. The debtor has no complicated financial structure. It has no outstanding bonds or secured indebtedness. All of its capital stock is owned by Seatrain Lines Inc. (R. 11). The filing of the petition followed closely upon the entry of judgment against the debtor for unpaid rent under the lease and the institution of a suit for additional rent thereunder. It is evident both from the petition itself (R. 10) and from a petition of the trustee filed on January 20, 1944 (R. 72) that the principal, if not the only reason for the filing of the petition was the inability of the debtor to pay the rent under the lease. It is apparent, therefore, that the only plan of reorganization which could be submitted by the debtor would involve a new lease on different terms.

To that the lessor will never agree, and the injunctive power of the court should not be exercised for the purpose of awaiting the futile gesture of a plan of reorganization which can never be consummated.

An application to withhold from the landlord its right of re-entry pending a plan of reorganization was made in this case and properly refused. The conclusion of the District Court was approved by the Circuit Court of Appeals, which said:

> "Under the circumstances, it can scarcely be held that the court below has abused its discretion in permitting a reentry by the landlord." (R. 97).

It is fundamental that a trial court's exercise of a discretionary power will not be disturbed unless it has been improvidently exercised; and that where, as here, the District Court's action has been approved by the Circuit Court of Appeals, the concurrent findings of the two courts should be accepted by this court as conclusive unless clearly erroneous. *Continental Bank* v. *Chicago, Rock Island & Pacific Railway Co., supra; United States* v. *Commercial Credit Co.*, 286 U. S. 63; *Stuart* v. *Hayden*, 169 U. S. 1; *Dun* v. *Lumberman's Credit Association*, 209 U. S. 20.

It is submitted, therefore, that a covenant against re-entry is not unenforceable as contrary to Section 77 and to public policy; that where necessary there is ample power in the equity jurisdiction of the court to assure the continued operation of a railroad by the exercise of its injunctive power against the immediate exercise of the right of re-entry; that both the District Court and the Circuit Court of Appeals held that this was not a case in which the right of re-entry should be postponed; and that the concurrent findings of these two courts should be accepted as conclusive.

## POINT III.

**Certificates under Section 1 (18) of the Interstate Commerce Act are not necessary conditions precedent to operation of the railroad by the lessor.**

The District Judge granted the motion to terminate the lease upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad had been complied with (R. 45). In order to satisfy this requirement, the lessor filed an application with the Interstate Commerce Commission to resume the operation of the railroad and in effect asked the Commission to find that the provisions of Section 1 (18) of the Act,* requiring a certificate of necessity and convenience before operation could be undertaken, did not apply, since the lessor was merely resuming operation of its own properties after temporary suspension during the existence of the lease. The petitioners herein sought and obtained leave to intervene in the proceedings before the Commission, and filed briefs. The Commission, in a formal report which indicates an exhaustive study of the question held that the lessor's application for a certificate was not within the purview of the statute, and that no certificate was required, since the lessor's obligations and duties to the public had never ceased, but have merely been performed by the lessee during the term of the lease (R. 56-57). The Commission therefore found that, independent of any certificate of necessity and convenience, the lessor had not only the right but the positive duty to resume the operation of the railroad, and in accordance with that finding, entered an appropriate order dismissing the lessor's application for a certificate (R. 57). Subsequently the District Court properly found that the requirements of the

* See Appendix, page 29.

laws relating to the continuous operation of the railroad had been complied with (R. 58).

Nor is there substance to petitioners' contention that the trustee must secure a certificate of abandonment from the Commission before he can turn over the railroad to the lessor. Abandonment connotes voluntary relinquishment. Here the trustee is not abandoning anything. The railroad is being taken by the lessor under its contractual rights with the lessee, against the will of the trustee and the lessee. Furthermore, the abandonment contemplated by the statute is an abandonment of railroad operation. There will be no cessation of operation in this case. It would be just as logical to argue that the debtor could not turn over the operation of the railroad to the trustee under the order of the court appointing a trustee herein without obtaining a certificate of abandonment, as it is to argue that the trustee cannot turn back the railroad to the lessor under the order of the court without securing such a certificate. The debtor of course made no such application. Let us assume that no petition for reorganization had been filed but that the Connecting Company was foreclosing a mortgage on the railroad. The rule for which petitioners contend would lead to the absurd conclusion that the mortgagor could defeat the foreclosure proceedings by refusing to apply for a certificate of abandonment. If the trustee feels that an application for a certificate of abandonment on his part is necessary to protect him from a violation of the Interstate Commerce Act he is perfectly free to make such an application now or at any time in the future. But his failure to do so can have no effect on the enforceability of the covenant against transfer in the lease.

It is not the petitioners' function to protect whatever public interest is involved in this matter. That is a matter solely between the Interstate Commerce Commission and the landlord. The Commission alone is charged with the

responsibility of enforcing the provisions of Section 1 (18). It could, in a proper case, under Sections 12 and 20 (9) of the act apply for a writ of mandamus to compel compliance with the provisions thereof. That however is a public function with which petitioners have no concern.

## POINT IV.

**Order No. 39 should not be reversed because it tranfers possession of certain railroad property, claimed by both the trustee and the lessor, to the lessor before determination of title thereto.**

Petitioners Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc. complain that Order No. 39 should be reversed because it provides that all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes shall be delivered to the lessor, notwithstanding conflicting claims thereto by the lessor and the trustee, and that claimants might thereafter file a claim with the Clerk of the Court for the recovery of such property or its value and reasonable compensation for its use, which claims will thereupon be determined by the Court, through reference to a Master or otherwise (R. 59).

This provision in the order was inserted at the suggestion of counsel for the trustee. It was an eminently practical suggestion, because the property in dispute, as is evident from the petitioners' brief, consists of two inconsequential lengths of track one about two hundred sixty-five feet in length, leading to a dead-end siding, and another about twenty feet long leading not to a float-bridge, as petitioners allege, but to a storage yard on land leased by debtor from the Delaware, Lackawanna and Western Railroad, which is of very little consequence in the operation of the railroad. The exclusion of either or both would

not impair the lessor's ability to operate the railroad in the slightest degree. Of course, they were worthless to the trustee standing by themselves. Consequently the trustee through his counsel suggested the provision in the order of which the other petitioners now complain. The effect of the provision is to permit the continued operation of these small tracts in conjunction with the railroad, while the question of whether or not they revert to the lessor upon the termination of the lease is being determined by a Master. If it should be determined that they do not revert, the trustee under the terms of the order will be entitled to proper compensation for their use. If it is determined that they do revert as the lessor claims, no harm has come of the order.

It is not disputed that practically all of the railroad property reverts to the lessor on termination of the lease. The amount in dispute is less than one-tenth of one per cent of the property involved, and has no vital bearing upon the operation of the railroad. Even if the court should find that the court below had no technical right to include such a provision in the order, no basis would be formed for the reversal of the order. At most the order should be reformed by rescinding the provision complained of.

## *Conclusion.*

***The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.***

Respectfully submitted,

EDWARD J. O'MARA,
*Attorney for Respondents.*

JOHN J. HICKEY,
*of Counsel.*

## APPENDIX.

Interstate Commerce Act, U. S. C. A. Title 49, Sec. 1 (18), provides:

"(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

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# In the Court of Claims of the United States

OCTOBER TERM, 1945

No. 384

FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR, ET AL., PETITIONERS

*v.*

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AMICI CURIAE

### OPINIONS BELOW

This brief is submitted in response to the Court's invitation of October 22, 1945, when granting the petition for a writ of certiorari in this case. The opinion of the Circuit Court of Appeals for the Third Circuit, rendered July 17, 1945, is reported in 150 F. (2d) 921. The opinion of the District Court for the District of New Jersey, rendered on August 4, 1944, is reported in 56 F. Supp. 187.

## STATEMENT

Hoboken Railroad, Warehouse and Steamship Connecting Company (hereinafter called lessor) operated a railroad from September 7, 1897, until June 19, 1906, when the railroad property was leased to Hoboken Manufacturers Railroad Company (hereinafter called lessee). The lease contained a covenant against assignment, sale, or transfer "whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained."

On July 26, 1943, lessee filed in the United States District Court for the District of New Jersey a petition for reorganization under 11 U. S. C. 205. A motion was made by lessor in that proceeding to permit the lessor to terminate the lease for breach of covenant, and to reenter and take possession of the leased premises. The District Court, in its opinion of August 4, 1944, decided that a breach of covenant had occurred and that lessor was entitled to possession of the premises. The concluding sentence of the District Court's opinion reads:

> The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the con-

tinuous operation of the railroad have been complied with.

Thereafter, on September 4, 1944, the lessor applied to the Interstate Commerce Commission under Section 1 (18) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to repossess and operate the railroad property. The Commission, on December 2, 1944, dismissed the proceeding, holding that no such certificate was necessary (257 I. C. C. 739). The Commission held that lessor was under a continuing obligation to operate its properties, either directly or through its lessee; and that consequently the lessor company, by operation of law and without respect to its own desires in the matter, immediately becomes responsible for the operation of railroad properties owned by it upon the termination of a lease thereof. The Commission said (p. 744):

> No certificate from us is needed because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf. Were this not so, when a long-term lease expired the lessor might contend that having withdrawn as an operating carrier in interstate commerce it had no responsibility for any further operation of the properties, and if it were re-

quired to obtain a certificate before resuming operation might decline to make application therefor and avoid any efforts to force it to resume operation on the ground that it was not required to do so unless it obtained a certificate.

Thereafter, on December 19, 1944, the District Court made its Order No. 39 authorizing lessor to terminate the lease and take possession of the railroad property. Lessee appealed to the Circuit Court of Appeals for the Third Circuit, which on July 17, 1945, rendered its opinion affirming the order appealed from. On October 22, 1945, this Court granted lessee's petition for writ of certiorari.

## QUESTION PRESENTED

This brief will discuss only the question whether the Interstate Commerce Commission was correct in holding that lessor was not required to obtain a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act.

## ARGUMENT

### THE COMMISSION WAS CORRECT IN HOLDING THAT LESSOR REQUIRED NO CERTIFICATE UNDER SECTION 1 (18) OF THE INTERSTATE COMMERCE ACT

The lower courts did not purport to review the validity of the Commission's decision, but apparently accepted it as final.[1] The apparent

[1] No mention was made of the present problem by the Circuit Court of Appeals.

intent of the district court to require the approval of the Interstate Commerce Commission before its order became final was an appropriate and reasonable means of insuring the accommodation of the judicial and the administrative processes operating in the same field. Cf. *Radio Station WOW* v. *Johnson*, 1944 Term, No. 593, decided June 18, 1945. There might in any event be a serious question as to whether the decision is reviewable in a collateral bankruptcy proceeding of this type, as distinct from the exclusive mode of review provided for in the Urgent Deficiencies Act (38 Stat. 220, 28 U. S. C. Sections 41 (28), 43–47). *Lambert Run Coal Co.* v. *Baltimore and Ohio R. Co.*, 258 U. S. 377; *North Dakota* v. *Chicago and N. W. R. Co.*, 257 U. S. 485, but cf. *Atchison, T. and S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 393–394.

If, however, this Court reaches the question as to the correctness of the Commission's decision of the issue arising under Section 1 (18) of the Interstate Commerce Act, it is submitted that the Commission's decision is correct on the merits. Section 1 (18), first enacted in the Transportation Act of 1920, was intended to prevent needless duplication of facilities. *Texas & N. O. R. Co.* v. *Northside Ry.*, 276 U. S. 475, 479; *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277; *Transit Commission* v. *United States*, 289 U. S. 121, 127–8.

But the continuance of an existing railroad operation by a different company cannot be regarded as a new service affecting competitive conditions. Section 1 (18) has been construed by the Commission and the courts as not applying to railroad lines in existence (or even in process of bona fide construction) when the law took effect. *Application of Uvalde & Northern Ry. Co.*, 67 I. C. C. 554; *Application of Texas, Oklahoma & Eastern R. Co.*, 67 I. C. C. 484; *Application of Gulf Ports Terminal Ry. Co.*, 71 I. C. C. 759. The foregoing Commission decisions were followed in *Detroit Terminal Railroad Company* v. *Pennsylvania-Detroit Railroad Company*, 15 F. (2d) 507, 508 (C. C. A. 6), and were cited with approval by Mr. Justice Brandeis in his opinion in *Piedmont & Northern Railway Company* v. *United States*, 280 U. S. 469, 474, 476, although in that case the question was abandoned by appellant and not decided by this Court.

By implication, however, the point was passed upon in *Transit Commission* v. *United States*, 289 U. S. 121, 129, where it said:

> There is no merit in appellants' contention that, because the joint use commenced prior to the Transportation Act and has since been continuous, the provisions of paragraph (18) do not apply. The extended term of the contract approved by the state commission expired January 1, 1927. The agreement submitted to the Interstate Commerce Commission for approval was made

> long after such expiration and when there was no agreement for continuing joint operation or use of the lines and other facilities.

From the foregoing language it is clear that if the facts in that case had been different, and if the agreement for extension of line by the joint use of trackage had taken effect prior to the effective date of Section 1 (18) and had continuously remained in force thereafter, the provisions of Section 1 (18) would have been inapplicable.

Likewise, in *Powell* v. *United States*, 300 U. S. 276, 287, this Court said:

> The purpose of §§ 1 (18) to 1 (22) of the Act was to empower the commission in proceedings instituted by a carrier proposing to engage in transportation over or by means of an additional or extended line authoritatively to decide whether it would be in the public interest. Unless the project is one covered by § 1 (18), the commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application.

The foregoing language makes it plain that unless transportation over or by means of "an additional or extended line" is involved, the Commission has no jurisdiction under Section 1 (18). In *St. Louis, Brownsville & Mexico Railway Co.* v. *Texas Mexican Railway Company*, No. 42, a different question is presented; while here there

is no issue as to the elimination of any operation but merely as to whether lessor or lessee performs it, in that case the question was as to the complete abandonment of the lessee's trackage rights and operations over lessor's line, a matter clearly subject to the Commission's jurisdiction.

In the case at bar the Commission correctly concluded that a common carrier may not relieve itself of its obligations to the public by merely leasing or otherwise disposing of its physical property. *Lehigh Valley Railroad Company Proposed Abandonment of Operations,* 202 I. C. C. 659, 663; *Norfolk Southern Railroad Company Receivers Abandonment,* 221 I. C. C. 258, 260; *Livestock Terminal Service Company Abandonment,* 257 I. C. C. 1, 7; *International & Great Northern Ry. Co.* v. *Anderson County,* 246 U. S. 424, 432. The carrier's obligation is a continuing one, and the lessor must furnish service, either through its lessee, or, in default thereof, through its own operation of the property. Upon termination of a lease, whether by passage of time or breach of covenant, the duty of continuing railroad service reverts to the lessor carrier. As the Commission well says (257 I. C. C. at 744):

> No certificate from us is needed because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations, the

duties must be performed by the lessor on its own behalf. Were this not so, when a long-term lease expired the lessor might contend that having withdrawn as an operating carrier in interstate commerce it had no responsibility for any further operation of the properties, and if it were required to obtain a certificate before resuming operation might decline to make application therefor and avoid any efforts to force it to resume operation on the ground that it was not required to do so unless it obtained a certificate.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that if this Court reaches the question arising under Section 1 (18) of the Interstate Commerce Act, the decision of the Interstate Commerce Commission is correct and should be sustained.

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DECEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

# SUPREME COURT OF THE UNITED STATES.

No. 384. October Term, 1945.

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, et al., Petitioners,

vs.

Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

April 29, 1946.

Mr. Justice Douglas delivered the opinion of the Court.

Hoboken Manufacturers Railroad Co. (the debtor) operates a terminal switching railroad along the waterfront at Hoboken, New Jersey. It is a common carrier subject to the provisions of the Interstate Commerce Act. 24 Stat. 379, 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 49 U. S. C. § 1. The major part of its right of way and lines of railroad is held by it under a 99 year lease from respondent dated June 19, 1906.[1] In 1943 the debtor filed a petition for reorganization under § 77 of the Bankruptcy Act, 49 Stat. 1969, 53 Stat. 1406, 11 U. S. C. § 205 in the District Court for the District of New Jersey. The petition was approved and petitioner Smith was appointed trustee. Shortly thereafter respondent notified the trustee that it would petition the reorganization court for termination of the lease. A hearing was held and decision reserved. While the matter was under advisement the trustee on order of the court adopted the lease. Thereafter the reorganization court granted respondent's motion to terminate the lease, holding that the appointment of the trustee was a breach

[1] The debtor has two additional pieces of land under 99 year leases, dated June 19, 1906, from the parent company of the respondent. By a tie-in indenture the debtor agreed that these leases should terminate on the expiration or earlier termination of the main lease mentioned in the opinion. What we say in the opinion also governs these tie-in leases.

of the terms of the lease entitling the lessor to reenter.[2] 56 F. Supp. 187. The Circuit Court of Appeals affirmed. 150 F. 2d 921. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Interstate Commerce Act and the Bankruptcy Act.

The provision of the lease upon which the forfeiture was decreed reads as follows:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor . . . . This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

By a further provision of the lease violation of that covenant entitled the lessor to terminate the lease and to reenter on specified notice.

Sec. 77(l), 11 U. S. C. § 205(l) provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Sec. 70(b) of the Bankruptcy Act, 11 U. S. C. § 110(b) provides in part:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by

[2] Notice was also given by respondent's parent company for termination of the tie-in leases mentioned in note 1, *supra*. The order of the District Court also terminated these leases.

operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

We have recently held that those provisions of § 70 b of the Bankruptcy Act are applicable to reorganizations under Ch. X, 52 Stat. 885, 11 U. S. C. § 526. *Finn* v. *McGlynn*, 325 U. S. 300. It is argued here, as it was there, that § 70 b should not be applied in reorganization proceedings since reorganization plans might be seriously impaired if forfeiture clauses in leases were allowed to be enforced. It is contended that forfeiture of railroad leases runs counter to the design and purpose of § 77, which is aimed at keeping railroad properties intact, so that reorganization plans may be worked out and disintegration of transportation systems prevented. It is argued that the policy of § 77 which prevents pledgees and mortgagees from foreclosing their liens (*Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 318 U. S. 523) is equally applicable to prevent lessors from causing forfeiture of leases. It is pointed out that § 77 a gives the reorganization court exclusive jurisdiction of the debtor and its property wherever located. It is noted that lessors are creditors as defined by § 77 b (1) and that a plan of reorganization can modify or alter the rights of creditors either through the issuance of securities or otherwise. § 77 b (3). It is also pointed out that a plan of reorganization may cure or waive defaults and may deal with all or any part of the property of the debtor. § 77 b (3), (5), and may provide for the rejection or adoption of leases. § 77 b (5). From these provisions and the policy they reflect it is argued that § 77 should not be construed as incorporating within it § 70 b.

As we have noted, § 77 d provides that so far as "consistent with the provisions" of § 77, the "duties of the debtor" and the "rights and liabilities of creditors" shall be the same as if a voluntary adjudication had been made. We cannot say that the forfeiture provisions of § 70 b on their face are inconsistent with § 77. They embrace leases of all kinds and sorts. They include leases of railroad tracks and facilities but they are not restricted to them. But if § 70 b is applicable to some leases under § 77 it would seem to be applicable to all. And termination of leases would in many

cases at least be as consistent with reorganizations of railroads under §77 as it would with reorganizations of other enterprises under Ch. X. Sec. 70(b) is applicable to reorganizations under Ch. X as we held in *Finn* v. *Meighan, supra.* As we pointed out in that case, an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee. That represents the bankruptcy rule. And we find no provision in §77 which suggests that Congress intended to make that rule inapplicable in case of railroad reorganizations.

It is argued, however, that the covenant in the present lease is not of the kind which is enforceable under §70(b). In other words, it is said not to be "an express covenant that an assignment by operation of law or the bankruptcy" of the lessee shall "terminate" or give the lessor "an election to terminate" the lease.

These forfeiture clauses are to be liberally construed in favor of the bankruptcy lessee. *Finn* v. *Meighan, supra.* Yet the covenant in question, so construed, seems to us to fall within §70(b). It applies to any "transfer" of the premises "in any proceeding, whether at law or in equity or otherwise" to which the lessee is a party "whereby any of the rights, duties and obligations" of the lessee are "transferred, encumbered, abrogated or in any manner altered" without the lessor's consent. When the trustee adopted the lease, the lessee's interest was transferred to him. *Palmer* v. *Palmer*, 104 F. 2d 161. That transfer, being in a §77 proceeding, was made in a "proceeding, whether at law or in equity or otherwise." The lessee was a party to the proceeding. And by the adoption the trustee acquired such rights and obligations under the lease as the lessee had.

But the question remains whether enforcement of the forfeiture clause would be "consistent with the provisions" of §77 within the meaning of §77(l). That question does not seem to have been considered by the lower courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization court should not have declared a forfeiture of the lease until the questions had been passed upon by the Commission. There are two aspects of that problem. The first relates to abandonment of operations by the trustee.

The District Court terminated the lease and authorized the lessor to reenter upon the premises and to oust the debtor and the

trustee. This order followed an order of the Interstate Commerce Commission dismissing an application made by respondent to resume operations of the properties. The application was dismissed because the Commission was of the view that no certificate from it was needed. It ruled that the lessor's "obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations the duties must be performed by the lessor on its own behalf." 257 I. C. C. 739, 744. And the Commission added: "[A]nd when the lease is terminated and the property reverts to the applicant, it will have no alternative but to resume operation thereof." *Id.*, p. 744.

But that case only held that the lessor needed no certificate of public convenience and necessity under § 1 18 to operate the road, as, if and when the lessee or its trustee ceased operations. It did not pre ur the question whether operations by the lessee or its trustee might be abandoned. No application for abandonment of operations by the lessee or its trustee was before the Commission. Authority of a lessor to resume operations if the lessee or its trustee abandons is one thing; authority of the lessee or its trustee to abandon is quite different.

Sec. 1 18 of the Interstate Commerce Act provides in part:

> "[. . .] no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In *Thompson* v. *Texas Mexican Ry. Co.*, decided this day, we held that a company having trackage rights over the lines of another must receive authorization to abandon the operations. That case is, of course, different from the present one because it entailed complete abandonment of operations by one company over another's lines. Here the question is whether the lessee or the lessor shall perform the service. But § 1(18) provides that "no carrier by railroad" shall abandon "the operation" of all or any portion of a line without a certificate from the Commission. Discontinuance of operations by the trustee is abandonment of operations by a carrier within the meaning of § 1(18). And a certificate is required under § 1(18) whether the lessee or the lessor is abandoning operations. See *Lehigh Valley R. Co. Proposed Abandonment of*

*Operation*, 202 I. C. C. 659; *Norfolk Southern R. Co. Branch Abandonment*, 221 I. C. C. 278. Whether the public interest requires that the line be operated by the lessee rather than the lessor presents a question for the Commission under § 1-18 of the Interstate Commerce Act. The lessor is not at the mercy of the lessee in this situation. For the lessor, as well as the lessee, has the standing necessary to invoke § 1-18 on the question of abandonment. *Thompson v. Texas Mexican Ry. Co.*, *supra*.

The second aspect of the problem is related to the first. It is the function of the Commission under § 77 to prepare the plan of reorganization of the debtor company. § 77 (d). As we stated in *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, 468:

> "These reorganizations require something more than contests between adversary interests to progress plans which are fair and in the public interest. When the public interest as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court."

The Commission in preparation of the plan is guided not only by the requirements that the plan be fair and equitable and feasible. It is also charged with the duty of preparing a plan that "will be compatible with the public interest." § 77 (d). Whether a leased line should continue to be operated by the lessee or should revert to the system of the lessor may present large questions bearing on the development by the Commission of an adequate transportation system. Interstate Commerce Act § 1. Moreover, it appears in the present case that forfeiture of the lease will deprive the debtor of all of its railroad properties.[3] Whether a particular carrier should

[3] The District Court ordered the trustee to turn over to the respondent all of the property held or used for railroad purposes except bank accounts, cash, accounts receivable and the like. Among the property were short lengths of line which the debtor claimed to own in fee but which the respondent asserted should revert to it. The order of the District Court provided that the trustee might file a claim for that property or its value and reasonable compensation for its use.

go out of business presents problems of primary importance to its security holders and perhaps to the public interest as well. If forfeiture of the lease is now declared, no plan of reorganization may be possible. The problem of preparing a plan of reorganization will often present to the Commission decisions concerning the adoption or rejection of leases. The adoption of a lease by the trustee does not preclude rejection of it in the plan of reorganization. § 77 b. The scheme of the Act is, indeed, to settle in the plan of reorganization the various claims to the property. The Commission may decide that it is in the public interest as well as in the interest of the private claimants that a lease be adopted. If it is adopted, then any defaults under it can be cured.[4] § 77 b (5). Or it may conclude, as it did in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & P. R. Co.*, *supra*, pp. 546-555, that a lease should be rejected unless the lessor consented to a revision of its terms. Or it may conclude that forfeiture of a lease according to the provisions of § 70 b would be compatible with the public interest. As we stated in *Palmer v. Massachusetts*, 308 U. S. 79, 87: "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission." And see *Warren v. Palmer*, 310 U. S. 132. The point is that if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it interferes with the functions entrusted to the Commission under § 77. Forfeiture of a lease in accordance with the provisions of § 70 b may be wholly consistent with the preparation of a plan of reorganization under § 77. But, as we have said, the nature of the plan of reorganization to be submitted is entrusted primarily to the Commission. If forfeiture of leases can be decreed without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor.[5] The

[4] Sec. 77 (b) (5) provides in part: "A plan of reorganization within the meaning of this section . . . shall provide adequate means for . . . the curing or waiver of defaults."

[5] *Finn v. Meighan*, *supra*, involved the forfeiture of a lease in reorganization proceedings under Ch. X. But the problem there was not complicated by any provisions of Ch. X giving to an administrative agency the functions entrusted to the Interstate Commerce Commission under § 77. As we stated in *Palmer v. Massachusetts*, 308 U. S. 79, 87, ". . . the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

federal policy embodied in § 77 can prevent enforcement of the engagements of the debtor pursuant to their terms. *Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co.*, *supra*. Cf. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624.

We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause remanded. The District Court should stay its hand pending a decision by the Interstate Commerce Commission on the questions.

*Reversed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.